92-1277

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CLINT NAGANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE STATIONHOUSE INVENTORY SEARCH OF PETITIONER'S BRIEFCASE AFTER A TRAFFIC ARREST EXCEED THE PERMISSIBLE SCOPE FOR SUCH SEARCHES DELINEATED IN *SOUTH DAKOTA V. OPPERMAN, ILLINOIS V. LAFAYETTE* AND *COLORADO V. BERTINE*?

2. DID THE NINTH CIRCUIT DISREGARD THE HOLDING IN *FLORIDA V. WELLS*, 495 U.S. 1 (1990) WHEN IT REFUSED TO APPLY THE HAWAII SUPREME COURT'S CRITERIA FOR INVENTORY SEARCHES STATED IN *STATE V. PERHAM*, 72 HAWAII 295, 814 P.2D 914 (1991)?

3. DID THE NINTH CIRCUIT DISREGARD THE HOLDING IN *FLORIDA V. WELLS*, 495 U.S. 1, 4 (1990) WHEN IT UPHELD A STATIONHOUSE SEARCH OF PETITIONER'S BRIEFCASE BY HONOLULU POLICE WITH "NO POLICY WHATSOEVER WITH RESPECT TO THE OPENING OF CLOSED CONTAINERS ENCOUNTERED DURING AN INVENTORY SEARCH?"

4. DID THE NINTH CIRCUIT ERR WHEN IT CONCLUDED, AFTER THE REDACTION OF INFORMATION OBTAINED BY AN ILLEGAL INVENTORY SEARCH, THAT THE GOVERNMENT'S SEARCH WARRANTS NEVERTHELESS CONTAINED SUFFICIENT EVIDENCE TO ESTABLISH PROBABLE CAUSE UNDER *ILLINOIS V. GATES*?

IDENTIFICATION OF PARTIES

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I.

DECISIONS BELOW

This Petition seeks review of the Memorandum Opinion ("Opinion") entered by the Court of Appeals for the Ninth Circuit on April 9, 1992, in *United States of America v. Clint Nagano,* No. 91-10055, which affirmed the Judgment of Conviction entered by the United States District Court for the District of Hawaii on January 14, 1991, in D.C.No. CR-90-00287-HMF. Defendant-Appellant-Petitioner CLINT NAGANO ("Nagano") challenged a May 24, 1990, Decision and Order ("Order") by District Court Judge Martin Pence denying Nagano's Motion to Suppress Evidence ("Motion"). The Motion challenged a January 31, 1990, search warrant affidavit.

These decisions were not published. The search warrant affidavit and the decisions below are set forth in Appendices A through D to this Petition.

II.

STATEMENT OF JURISDICTION

This is an appeal from a judgment in a criminal case. The United States District Court for the District of Hawai'i has jurisdiction to hear and determine cases involving offenses against the United States under 18 *U.S.C.* Section 3231. A judgment of conviction is appealable from that court to the Ninth Circuit Court of Appeals under *F.R.A.P.* Rule 4(b) and 28 *U.S.C.* Sections 1291 and 1294(4). Certiorari may be sought in this Court from decisions of the Courts of Appeal under 28 *U.S.C.* Section 1254.

On February 21, 1990, Nagano was charged with Bank Robbery, in violation of 18 *U.S.C.* Section 2113(b). Clerk's Record, Docket No. 10 ("CR 10").

On April 3, 1990, Nagano moved to suppress evidence obtained by identical federal search warrants from Nagano's briefcase and residences. CR 34; *see* Appendix A. The search warrants were obtained by federal officers utilizing evidence seized by Honolulu Police Officers after a traffic arrest in

Waikiki in violation of the Fourth Amendment of the *United States Constitution* and Article I, Section 7 of the *Hawaii Constitution.*

On May 24, 1992, District Judge Martin Pence denied Nagano's Motion. CR. 61. On January 14, 1991, after tender of a conditional guilty plea under *F.R.Cr.P.* Rule 11(a)(2), Judgment of Conviction was entered in the District Court on three counts of Bank Robbery. CR 105, 106. Nagano was sentenced to prison and remains incarcerated. *Id.*

On January 18, 1991, Nagano filed a timely notice of appeal. CR 107. On April 9, 1992, the Court of Appeals, by Judges Goodwin, Fletcher and Brunetti, issued its Opinion affirming the conviction. *See* Appendix C. On April 23, 1992, Nagano filed a timely Petition for Re-hearing and Suggestion for Re-hearing en Banc. On October 22, 1992, the petition was denied, rendering this Petition for Certiorari due on or before January 20, 1993. *See* Appendix D.

III.

STATEMENT OF THE CASE

Nagano's Motion, the Ninth Circuit appeal, and this Petition for Certiorari, all address a state police search of Nagano's car and its contents conducted after a traffic arrest in Waikiki on January 31, 1990. The circumstances of the stop, the arrest, and the roadside and station house searches, were described by Honolulu Police Officers, and Nagano and his girlfriend Kilsoon Pelekai ("Pelekai"), at a suppression hearing in District Court on April 26, April 30, May 3, and May 17, 1990.

In the early evening of January 30, 1990, Nagano and his girlfriend of many years, Pelekai, went to the Aina Haina residence of Nagano's parents, Masakazu and Alice Nagano. Reporter's Transcript, May 17, 1990, at page 121 ("RT 5/17/90:121"); RT 5/3/90:6, 19. Nagano was a self-employed locksmith and also engaged in other business activities. *Id.* He operated on a cash basis and stored much of his cash at his parents' residence. RT 5/17/90:122. That evening Nagano picked up $17,000 in cash from the Aina Haina residence,

placed it inside a locked briefcase, and departed in a yellow Toyota hatch-back to a car dealership to shop for a Porsche. RT 5/17/90:122.

After visiting the dealership, Nagano and Pelekai drove through Waikiki along Kalakaua Avenue. *Id.* Pelekai spilled food inside the Toyota and Nagano decided to stop to clean up the car. RT 5/17/90:124. At Lewers and Kalakaua streets, Nagano turned right onto Lewers against a red traffic signal. *Id.* A sign posted at the intersection read, "no right turn on red." *Id.* Honolulu Police Officer Jean Minic, driving behind Nagano's car, saw Nagano make the right turn onto Lewers against the traffic signal. *Id.* Minic decided to cite Nagano for the illegal turn, and turned onto Lewers to follow the Toyota. *Id.* Minic also noticed Nagano was not wearing his seat belt. RT 4/26/90:14, 15.

After turning onto Lewers, Minic was flagged down by an unknown male on the street. *Id.* The male told Minic that the driver of the Toyota had called him to his car earlier that night and "said something about drugs." *Id.* The male told Minic that the driver had opened a briefcase and showed him a large amount of cash. RT 4/26/90:16.

Minic continued down Lewers and caught up with the Toyota at a turn-around area in front of the Royal Hawaiian Hotel. *Id.* Nagano testified he had stopped there to clean up the food spilled by Pelekai and was about to leave when Minic approached in her Cushman. RT 4/26/90:17; RT 5/17/90:125.

Minic testified she parked her Cushman behind the Toyota, notified dispatch of the traffic stop, and approached the driver's window. *Id.* Minic pointed her flashlight through the driver's window and searched the interior around Nagano and his seat. RT 4/26/90:18. Minic told Nagano she had stopped him for making the illegal right turn against the red light at Lewers and Kalakaua, and for driving without seat belts. RT 4/26/90:19.

When Minic continued her flashlight search, she saw what looked like a revolver near Nagano's left foot. *Id.* At this time Honolulu Police Officer Calvin Tong arrived to assist Minic. *Id.* Tong approached the Toyota on the passenger

side and questioned Pelekai. *Id.* Minic told Tong, "we [have] a gun." *Id.* Tong drew his revolver and held it on Nagano and Pelekai. *Id.* Minic ordered Nagano to raise his hands and exit the Toyota. RT 4/26/90:20. Minic ordered Nagano to place his hands on the car and conducted a pat down search. RT 4/26/90:20; RT 5/17/90:129.

Nagano testified that Minic then handcuffed him from behind, lead him away from the car, and ordered him to sit on the ground. RT 5/17/90:129, 130. Minic testified that Nagano was not handcuffed until later. *Id.* Tong's testimony agreed with Nagano's. *Id.*

Minic recovered a revolver-like object from inside the Toyota. RT 4/26/90:21. Nagano told her that it was only a harmless starter's pistol. *Id.* Minic's examination confirmed this. *Id.*

Nagano and Pelekai testified that as Nagano sat handcuffed on the ground, Minic conducted a pat down search of Pelekai near the passenger side of the Toyota. RT 5/17/90:10, 11. Minic took possession of Pelekai's purse, handed the purse to Tong, and sat Pelekai down on the ground near Nagano. *Id.* Tong placed his hand inside Pelekai's purse and began searching through its contents. *Id.* Minic then joined Tong, whereupon they dumped the contents of Pelekai's purse onto the floor of the front passenger side of the Toyota and rummaged through its contents. *Id.* They approached Pelekai and accused her of "doing drugs" with Nagano. RT 5/17/90:12, 18, 19, 20. Pelekai told them Nagano only took the prescription drug "Xanax," but that he had not consumed the drug that night. RT 5/17/90:19, 20. According to Nagano and Pelekai, the officers kicked Pelekai several times in the left thigh and buttocks. RT 5/17/90:14, 15, 20.

Nagano and Pelekai testified that Minic and Tong then returned to the Toyota and searched through a red bag in the back seat. RT 5/17/90:12, 18, 134. The bag was owned by Pelekai and contained a clear bag of yellow protein powder, some nuts, a fork, a spoon and napkins. *Id.* The officers removed the bag, sniffed its contents, and accused Pelekai and Nagano of "doing drugs." *Id.* When Tong took the stand, he denied he retrieved or searched any red bag containing

powder or other items. RT 4/26/90:109. Minic also denied she and Tong conducted any search of any red bag. RT 4/26/90:62.

Nagano and Pelekai testified that Tong then retrieved Nagano's locked briefcase from inside the Toyota, opened the back hatch of the car, and placed the briefcase down. RT 5/17/90:22, 23, 135. When Tong placed his hands on the left and right locks of the briefcase, Nagano shouted, "you have no right to touch my property." *Id.* Tong had trouble unlocking the briefcase. *Id.* Tong pointed his revolver at Nagano's legs and demanded that Nagano provide him with the combination to the briefcase lock. RT 5/17/90:136-138. Nagano was "petrified," but he refused to comply, instead repeating to Tong that he "had no right doing this." *Id.* Tong returned to the briefcase and succeeded in breaking it open. RT 5/17/90:139.

Nagano and Pelekai testified that Tong and Minic then began searching through the contents of the briefcase. RT 5/17/90:24, 25, 139, 140. The officers counted the bundles of cash and questioned Nagano about the money. *Id.* Although Nagano told them about his intended purchase of a car, he overheard the officers discussing Nagano's possible involvement in a drug transaction. *Id.* Minic and Tong "rummaged" through letters inside the briefcase. *Id.* They removed a notebook from inside the briefcase and both Minic and Tong "went through" the contents of the notebook. RT 5/17/90:139-141. Minic retrieved Nagano's State of Hawaii identification card from the briefcase and returned to her Cushman radio to call dispatch with the number. *Id.* Minic asked Tong if she could arrest Nagano for driving with a suspended license. *Id.* When Tong said "yes," Minic radioed dispatch and asked for a "blue and white" to transport Nagano downtown. RT 5/17/90:140.

Minic's testimony presented a different version than Nagano and Pelekai about the events following Nagano's exit from the Toyota. According to Minic, once she sat Nagano on the ground and returned the starter's pistol to the inside of the Toyota, she approached Nagano and requested for the first time that he produce his driver's

license, no fault insurance card, and vehicle registration. 4/26/90:24. Nagano told Minic that he was not the registered owner of the Toyota. *Id.* From somewhere on his person, Nagano produced an identification card. RT 4/26/90:72.

Upon reviewing Nagano's identification, Minic radioed dispatch and conducted a warrant check. *Id.* Minic was told by dispatch that Nagano's driver's license had been suspended or revoked and that the Toyota was registered under Nagano's name. *Id.* Minic again asked Nagano to produce the registration papers for the Toyota, but Nagano was unable to do so. *Id.* Minic testified it was at that point that she arrested Nagano for driving without a valid driver's license, driving without vehicle registration papers and no-fault insurance papers, driving without a fastened seat belt, and making an illegal right turn on a red traffic signal. RT 4/26/90:23. Minic testified it was at this point that she first handcuffed Nagano. RT 4/26/90:50. She testified her decision to arrest Nagano was not influenced by the information about Nagano's involvement with drugs earlier provided to her by the unknown male. RT 4/26/90:24. Minic further testified that prior to her arrest of Nagano, neither she nor Tong engaged in any searches of Nagano's Toyota or his briefcase. RT 4/26/90:24.

Minic testified that her decision to arrest Nagano for the traffic infractions was influenced by the fact that Nagano's movements appeared "slow," that Pelekai mentioned that Nagano had taken Xanax, that Pelekai was not a licensed driver, and that Nagano's vehicle had to be locked up at the scene. RT 4/26/90:23, 24. Hence, when the transport vehicle arrived, Minic asked Nagano whether he wished to take any personal property with him to the police station. *Id.* Nagano said he wanted to take his briefcase with him since it contained a lot of money. RT 4/26/90:25.

Minic and Tong both testified that at this point the briefcase was first retrieved from the back seat of the

Toyota.[1] RT 4/26/90:24, 25, 82. Tong said he removed the briefcase from the car because Nagano "was handcuffed [and] there was no way he could have got the briefcase out of the car." RT 4/26/90:102.

Minic testified that she told Nagano if he wished to take the briefcase with him, she "would have to make sure there's money in it . . . and also make sure that there's no bomb or explosives in it." RT 4/26/90:25. Minic said Nagano answered "that's fine." RT 4/26/90:26.

Minic and Tong testified that at that point, they noted that the briefcase was locked by a combination lock. *Id.* Tong asked Nagano for the combination. *Id.* Tong said Nagano was already handcuffed and without hesitation provided Tong with the combination. RT 4/26/90:82. Tong opened the briefcase in Nagano's presence. *Id.* Tong and Minic conducted a "sweep of its contents" to check for "hidden panels" and explosives. RT 4/26/90:84, 85. They saw a large amount of cash bundled in currency wrappers. *Id.* They counted up the bundles, "kind of added up the amounts," and "verified" that there was "more or less" $17,000, as Nagano claimed. RT 4/26/90:104. In addition to the money, the officers saw a notebook, some automatic teller machine envelopes, unused currency wrappers and "various other paperwork." RT 4/26/90:26, 85, 107. The briefcase was closed and taken to the transport vehicle. RT 4/26/90:27, 85.

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[1] Minic acknowledged on cross-examination that during her initial flashlight search of the interior of the Toyota, she observed the presence of the briefcase in the back seat and believed that the briefcase was the one earlier observed and reported to her by the unknown male. RT 4/26/90:51, 52, 53. Based upon the information related to her by the unknown male, Minic acknowledged that she had a slight suspicion that Nagano's briefcase may have contained drugs or money. *Id.* However, Minic maintained that because of the unreliability of the unknown male's tip, she never informed Tong nor any other officer at the scene about the information she earlier received about Nagano's involvement with drugs and money. RT 4/26/90: 62. Tong testified that no mention of Nagano's involvement with drugs was made to him by Minic. RT 4/26/90: 81.

Honolulu Police Officer Albert Peterson arrived at the scene to confer with Minic about the starter pistol and told Minic that no violation of law had occurred. RT 4/30/90:4, 5. Tong then retrieved Nagano's briefcase from the transport vehicle, and opened it again to show Peterson its contents and obtain "another verification of the amount of money." RT 4/26/90, 86. Peterson looked in the briefcase and saw large amounts of bundled cash. RT 4/30/90:5. He "pushed aside" the money and "looked underneath" it "for explosives." RT 4/30/90:24.

Nagano testified that when the transport vehicle arrived and he realized he would be arrested and transported to the police station for the suspended license violation, he did not want the police to take his briefcase or its cash contents. *Id.* Before being placed inside the transport vehicle, Nagano twice requested that the officers transfer his briefcase and its contents to his girlfriend Pelekai. RT 5/17/90:141, 142. Pelekai also testified she requested the officers to allow her to take possession of Nagano's briefcase, as Nagano requested. RT 5/17/90:26. After Nagano was placed in the rear seat of the transport vehicle, he observed one of the transporting officers enter the front seat of the vehicle with his briefcase. *Id.* Nagano again urged that the officers transfer his briefcase to his girlfriend who was still present at the scene. *Id.* The officers refused to honor Nagano's request. RT 5/17/90: 142.

Minic, Tong and Peterson confirmed that Nagano asked that the police transfer his briefcase and its contents to Pelekai at the scene. RT 4/26/90:87; RT 4/30/90:7. Minic and Tong knew that Pelekai was Nagano's girlfriend. *Id.* Peterson was told by Nagano that he "trusted" Pelekai to take possession of his briefcase. RT 4/30/90:7. Nonetheless, Peterson refused. *Id.* Peterson explained it was the "responsibility" of the police to "take precautions" regarding an arrestee's property and "to document the funds properly." *Id.*

Peterson testified that the police department maintained written policies and procedures regarding the "transportation of arrested persons." *Id.* He said such policies require the police to secure the safety of the arrestee and his property. RT 4/30/90:9, 11. Peterson said police policies imposed no

requirement that the police retain possession of such property. *Id.* He testified that a police officer's decision to retain or to hand over such property is entirely "discretionary" with the individual officer. RT 4/30/90:19, 20, 23. Peterson acknowledged that he frequently transferred briefcases and other items of an arrestee's property to passengers or friends at the scene of an arrest. RT 4/30/90:20.

Upon Nagano's arrival at the police station, the transporting officer handed Nagano's briefcase to receiving desk officer Jesse Babauta, telling Babauta that there was a large sum of money inside. RT 4/30/90:33. Babauta and Officer Michael Mata, under the supervision of Sergeant Kevin Katamoto, opened the briefcase and counted the money. *Id.* The officers counted $17,000 and recorded it on an inventory sheet. RT 4/30/90:34, 35.

Babauta and Mata then proceeded to "inventory all the property" inside the briefcase and to further "check [the briefcase] for any contraband or weapons." RT 4/30/90:33. In doing so, they discovered a black and white composition notebook. *Id.* Babauta "opened it up to check if there was any other money or contraband between the pages of the notebook." RT 4/30/90:35. Babauta decided he could not check through the notebook by simply shaking it since "there could have been a fold-in or a little flap or something else and something could have gotten stuck." RT 4/30/90:36. Babauta searched the notebook "page by page" to "make sure that there was no secret compartment or something" which contained money or drugs. RT 4/30/90:36, 45.

Babauta proceeded to "browse through" the notebook. RT 4/30/90:39. As he and Mata checked each page, the fourth page from the end "caught [Babauta's] eye." *Id.* Babauta saw the encircled letters "IT." *Id.* Babauta "stopped" and "looked closer" at the page. RT 4/30/90:49. He "read the page to see what it said." RT 4/30/90:49. The page contained dates, days of the week, times and locations. RT 4/30/90:35, 37, 38. Babauta testified that he previously worked on an FBI detail investigating burglaries of automatic teller machines. *Id.* He noted that the locations listed on the page corresponded with locations of Automatic Teller Machines ("ATM") on Oahu.

RT 4/30/90:35-36. Babauta "right there kind of figured that [Nagano] may be connected with the ATM burglaries that were going on." RT 4/30/90:38.

Babauta then went back to the beginning of the notebook and "proceeded to check if there were any other [similar] pages." RT 4/30/90:38, 51. He read the notebook page by page, looking for more "IT" symbols. *Id.* His investigative, warrantless search of the briefcase lasted four or five minutes. RT 4/30/90:59.

Babauta alerted Katamoto and showed him the pages in the notebook with the "IT" symbols. *Id.* Katamoto looked at the pages and "saw numbers, dates, pages and locations." RT 5/3/90:108. Babauta told Katamoto the significance of the writings and of the possible connection to the ATM burglaries. RT 5/3/90:108, 113. Katamoto told Babauta to call the FBI. RT 5/3/90:113. Katamoto placed the briefcase and its money and notebook inside a safe. RT 5/3/90:106. Later when Babauta completed Nagano's property inventory sheet, he did not even list the notebook. RT 4/30/90:51.

Babauta telephoned FBI agent Roger Kent at home. RT 4/30/90:38. Babauta worked with Kent on the ATM burglary investigations in 1989. RT 4/30/90:42. Babauta told Kent that Nagano had been arrested for traffic offenses, and had in his possession a briefcase containing $17,000 in cash and a notebook with writings of different automatic teller locations and times. RT 4/30/90:39. Kent told Babauta that Nagano was an FBI suspect in the ATM burglaries and that agents would be sent to the police station. RT 4/30/90:41.

Shortly thereafter, FBI agents Faulkner and Gilmartin, along with a third agent, arrived at the police station. RT 5/3/90:107. Katamoto and Babauta took the briefcase and the three agents into a private office. *Id.* Katamoto and Babauta opened the briefcase and showed the agents its contents. RT 4/30/90:56; RT 5/3/90:107. Katamoto "picked up [the notebook], opened it up, showed [the agents] some of the pages" and explained the significance of the writings. RT 5/3/90:107. The agents "looked at" the notebook as Katamoto held it open for their inspection. RT 5/3/90:107. The FBI agents told Katamoto that Nagano should be placed on a "federal hold."

RT 5/3/90:118, 120. Katamoto returned the briefcase and its contents to the police safe. RT 5/3/90:120.

After receiving Babauta's telephone call, agent Kent began preparation of search warrants for Nagano's briefcase, Nagano's Ewa Beach home, the Aina Haina residence of Nagano's parents, and Nagano's Toyota. *Id.* Pending the issuance of the warrants, Kent directed FBI agents to detain the Aina Haina and Ewa Beach residences to ensure that no evidence was destroyed before the warrants were served. RT 5/3/90:3.

At 3:00 a.m. on January 31, 1990, FBI agent James Applebaum arrived at 432 East Hind Drive in Aina Haina, the residence of Masakazu and Alice Nagano. *Id.* Shortly before 6:00 a.m., Applebaum observed the elder Nagano exit the residence and head towards a car. *Id.* Applebaum approached and identified himself, displayed his badge, and said he was there to "detain" the residence pending the arrival of a search warrant. RT 5/3/90:2-3. Applebaum said the elder Nagano had "no problem" with Applebaum waiting at the residence until the warrant arrived. RT 5/3/90:6. In contrast, the elder Nagano testified he was "frightened" by Applebaum's conduct and felt compelled to cooperate by permitting Applebaum entry into his home. RT 5/17/90:66, 69.

Applebaum entered the residence and interviewed the elder Nagano. *Id.* At 6:30 a.m., the elder Nagano departed for work and left Applebaum in the company of his wife. *Id.* Applebaum searched the elder Nagano's vehicle before it left the premises. RT 5/3/90:8. Applebaum waited all day at the house for the warrant. *Id.* Applebaum saw an aluminum ladder, two orange traffic cones and two orange extension cords in the house. RT 5/3/90:13. He telephoned agent Kent and related his observations so Kent could place them in the search warrant affidavits. RT 5/3/90:58. FBI agent Margaret Faulkner joined Applebaum at the residence during the day. RT 5/3/90:84, 88. Applebaum and Faulkner stayed ten hours before the warrant arrived. *Id.* During the day the elder Nagano returned from work and asked the agents to leave. *Id.*

They refused. RT 5/3/90:84, 85. Meanwhile, the Ewa Beach residence of Nagano and Pelekai at 91-805 Aaha Street was similarly detained by two FBI agents pending execution of a search warrant at those premises. *Id.* The agents arrived at that residence at 4:00 a.m. and with Pelekai's consent, they remained inside the home all day. RT 5/3/90:124-129.

At 4:10 p.m. on January 31, 1990, a United States magistrate authorized and issued four search warrants prepared by agent Kent for the search of Nagano's briefcase, the residences at 432 East Hind Drive and 91-805 Aaha Street, and the 1983 Toyota station wagon. CR 51; *see* Appendix A. The warrants sought evidence related to ATM burglaries and were supported by an affidavit by agent Kent. *Id.*

In paragraph 13 of Kent's affidavit, Kent related he had been advised by Babauta at 1:00 a.m. on January 31, 1990, that Nagano had been arrested on traffic charges and police had recovered a briefcase in his possession containing $17,000 in cash and a notebook containing "handwritten notes indicating that Nagano had been recording information about various ATM's and their cash replenishment schedules." *See* Appendix A. Paragraph 14 stated that Nagano's notebook also contained the telephone number of Clint Ross and Source #1. *Id.*

Finally, Kent's affidavit stated that agent Applebaum had observed a ladder, traffic cones, and orange extension cords at 432 East Hind Drive, and noted that similar items has been found at the scene of a 1989 ATM burglary. *See* Appendix A.

At the conclusion of the suppression hearings, the District Court filed a 25-page order denying Nagano's Motion. *See* Appendix B. The court concluded that the searches of Nagano's briefcase at the scene of Nagano's arrest and at the police station, as well as those of the two residences, were lawful. *Id.*

The District Court made the following relevant findings of fact. *Id.* Minic, said the court, stopped Nagano for making an unlawful right turn on a red light, ordered him out of the car when she observed the revolver-like object, patted him down and handcuffed him, and ordered him to sit on the ground. *Id.* at 3. Pelekai was ordered out of the passenger seat

and questioned about drugs. *Id.* The officers "then began to search the car." *Id.* They searched the passenger and glove compartments, the trunk, Pelekai's purse, and a velcro-sealed bag containing protein powder and other items. *Id.* at 4. Upon request by the officers, Nagano "opened the [locked] briefcase" that was on the back seat of the car and "display[ed] the contents" to Minic. *Id.* When Minic learned that Nagano had a suspended driver's license, she arrested him for driving with a suspended license, driving without a no-fault insurance card and registration, driving without seat belts, and making an illegal right turn. *Id.* at 5. The District Court concluded that even though the warrantless searches of Nagano's car and his property were conducted prior to his arrest, the searches were incident to Nagano's arrest and were therefore constitutionally proper. *Id.* at 10-15.

The District Court concluded that the police were justified in inventorying the contents of Nagano's briefcase at the police station since there was a need to protect Nagano's large amount of cash, to protect the police against possible claims of theft and to discover the presence of any weapons or explosives. *Id.*

Finally, the District Court found that the affidavit of agent Kent provided sufficient probable cause for the issuance of the search warrants even without the information obtained from Nagano's notebook. *Id.* The court concluded that even if Kent's statements about the police discovery of the ATM writings in Nagano's notebook were "subtracted" from the affidavit, the information provided by the two unknown sources provided sufficient independent probable cause to establish that Nagano was connected with the ATM burglaries. *Id.* at 21-24.

On August 6, 1990, pursuant to a plea agreement, Nagano entered conditional guilty pleas to three counts of Bank Robbery and preserved his right to appeal the District Court's denial of his Motion. CR 95, 96.

On appeal, Nagano challenged the search and seizure by the Honolulu Police Department of his briefcase in the course of his arrest for traffic offenses, claiming, *inter alia*:

> 1) the roadside seizure was unnecessary and illegal under *United States v. Jenkins*, 876 F.2d 1085, 1089 (2d Cir. 1989) because of the presence of a willing bailee, girlfriend Pelekai;
>
> 2) the stationhouse search of the briefcase was conducted in violation of longstanding Hawaii law announced in *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974) and *State v. Perham*, 72 Haw. 290, 814 P.2d 914 (1991), prohibiting inventory searches of closed containers, which under *United States v. Wanless*, 882 F.2d 1459 (9th Cir. 1989) invalidates the inventory search in this case;
>
> 3) the roadside seizure and stationhouse inventory search were conducted in the absence of written policy or established procedure and were illegal under *Florida v. Wells*, 495 U.S. 1 (1990); and
>
> 4) the search of the ledger notebook exceeded the scope of inventory searches under federal law under *South Dakota v. Opperman*, 428 U.S. 364 (1976) and *United States v. Khoury*, 901 F.2d 948 (11th Cir. 1990).

See Appellant's Opening Brief ("OB") at 35, 40, 41 and 33. Nagano also argued that absent the evidence supplied from the warrantless search of his briefcase (consisting of the highlighted information in Appendix A), the search warrant affidavit lacked probable cause to search Nagano's briefcase, the car and the two residences. *Id.* at 44[2].

On April 9, 1992, the Ninth Circuit affirmed the trial court's Order denying Nagano's Motion. *See* Appendix C. The court rejected Nagano's argument #1, and ignored

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[2] Nagano also argued that the roadside search of his car took place prior to his formal arrest, *citing United States v. Parr*, 843 F.2d 1228 (9th Cir. 1988). *Id.* at 24.

Nagano's arguments #2 and #3. Opinion at 5[3]. The Ninth Circuit adopted Nagano's argument #4, ruling, "the later examinations of the notebook were investigatory in nature and should not have been conducted without a warrant." Opinion at 7, *citing United States v. Khoury*, 901 F.2d 948 (11th Cir. 1990).

Nevertheless, the court of appeals affirmed Nagano's conviction, rejecting Nagano's argument that the search warrant affidavit lacked probable cause when the notebook information was excised:

> Each of the affidavits described the teller machine thefts and the large amounts of currency stolen in these thefts, summarized information implicating Nagano in the thefts from confidential informants considered reliable by the FBI, *and described how the briefcase with $17,000 in cash had been recovered from Nagano during his arrest.* With the other information provided by the affidavits, these crucial facts provided the probable cause necessary to issue the warrants to search the briefcase and its contents and the two residences.

Opinion at 8 (emphasis added).

By suppressing the notebook entries while upholding the warrantless search of the rest of the briefcase under *United States v. Khoury, supra*, the court of appeals ignored Nagano's threshold inventory search arguments under *United States v. Wanless, supra*, and *Florida v. Wells, supra*, which barred Honolulu Police from seizing or opening Nagano's briefcase without a search warrant.

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[3] Regarding issue #1, the Ninth Circuit found "it was reasonable for the police to confiscate and inventory the contents of the briefcase in order to defer theft and false claims." Opinion at 5.

Regarding issues #2 and #3, the court did not cite *United States v. Wanless*, 882 F.2d 1459 (9th Cir. 1989), *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974), or *Florida v. Wells*, 495 U.S. 1 (1990), or discuss any of the issues raised in those cases.

IV.

ARGUMENT

Point 1: **THE DECISION IN THIS CASE DEPARTS FROM ESTABLISHED PRECEDENT THAT EVIDENCE OBTAINED THROUGH INVENTORY SEARCHES CONDUCTED BY STATE LAW ENFORCEMENT OFFICIALS, SHALL BE INADMISSIBLE IN A FEDERAL PROSECUTION UNLESS THE EVIDENCE WAS OBTAINED IN ACCORDANCE WITH STATE LAW AND LOCAL PROCEDURES.**

In three recent decisions by unanimous panels, the United States Court of Appeals for the Ninth Circuit established that when federal law enforcement officers defend a warrantless inventory search by a state officer, that search must comply with "the official procedures of the relevant state or local police department." *United States v. Johnson,* 936 F.2d 1082, 1084 (9th Cir. 1991); *see also, United States v. Mancera-Londono,* 912 F.2d 373, 375 (9th Cir. 1990); *United States v. Wanless,* 882 F.2d 1459, 1464 (9th Cir. 1989).

In Hawaii, stationhouse inventory searches of closed containers have been illegal for 16 years under *State v. Kaluna,* 55 Haw. 361, 520 P.2d 51 (1974). Consequently, Honolulu Police Officer Babauta's warrantless opening and inspection of Nagano's briefcase at the stationhouse on January 30, 1990, was illegal pursuant to pertinent State law because it was conducted in violation of Article I, Section 7 of the *Hawaii Constitution.* Moreover, the Hawaii Supreme Court affirmed its holding in *Kaluna* as recently as August 5, 1991, in *State v. Perham,* 72 Haw. 290, 814 P.2d 914 (1991).

Nonetheless, the April 9, 1992, Opinion by the Ninth Circuit concluded that, "police station personnel may search items in the possession of arrested persons for administrative reasons." *See* Appendix C at 6. While the court suppressed information obtained from the ledger notebook by Officer Babauta, citing *federal* authority from the Eleventh Circuit, *United States v. Khoury,* 901 F.2d 948 (11th Cir. 1990), it

made no attempt to discern established Honolulu Police Department procedures or accommodate Hawaii state law.

In *Illinois v. Lafayette*, 462 U.S. 640 (1983), Mr. Chief Justice Burger addressed inventory searches by observing that,

> it is reasonable for police to search the personal effects of a person under lawful arrest as part of *the routine administrative procedure at a police station* incident to booking and jailing the suspect. . . .

462 U.S. at 643 (emphasis added). The *Lafayette* majority concluded that, "it is not unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, *in accordance with established inventory procedures.*" 462 U.S. at 648 (emphasis added); *see also, Colorado v. Bertine*, 479 U.S. 367, 374 n.6 (1987) ("[o]ur decisions have always adhered to the requirement that inventories be conducted according to standardized criteria"); *South Dakota v. Opperman*, 428 U.S. 364, 375 (1975) (searches shall be "limited in scope to the extent necessary"). The language in *Lafayette, Bertine,* and *Opperman* made clear that federal courts must consult local law to determine the legality of "established inventory procedures" by state law enforcement officials.

The Ninth Circuit Court of Appeals has declared, as a matter of general policy, that federal courts need not follow state law when considering the constitutionality of evidence seized by state officials and later used in federal prosecutions. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372 (9th Cir. 1988). This policy, however, does not apply to inventory searches.

In *United States v. Wanless*, 882 F.2d 1459 (9th Cir. 1989), the Ninth Circuit carved an exception to the *Chavez-Vernaza* rule for warrantless inventory searches. Because of the importance of "local procedures" emphasized by this Court in *Opperman, Lafayette,* and *Bertine* (and now *Florida v. Wells*), the *Wanless* court ruled that if local officials do not follow local procedures during a warrantless inventory

search, evidence discovered during the search will be deemed inadmissible as a matter of *federal* law:

> [t]he government contends that *United States v. Chavez-Vernaza*, 844 F.2d 1368 (9th Cir. 1987), requires this court to find that the inventory searches of the two vehicles were proper. In *Chavez-Vernaza*, we held that evidence that is obtained in accordance with federal law is admissible in federal court even though it was obtained in violation of state law. *Id.* at 1374. However, as *Opperman* and *Bertine* make clear, the *federal* law on inventory searches by state or local police officers is that they must be conducted in accordance with the official procedures of the relevant *state or local* police department. *See also United States v. Woolbright*, 831 F.2d 1390, 1394 (8th Cir. 1988) (validity of inventory search performed by county police officers determined by considering county police procedures). The procedures of the Washington State Patrol for conducting an inventory search were not followed here.

Wanless, 882 F.2d at 1464 (emphasis in the original).[4]

The *Wanless* court did not restrict its consideration of Washington State police procedures to law enforcement manuals or officer testimony. The *Wanless* court located the proper procedure for Washington State inventory searches in *State v. Williams*, 102 Wash.2d 733, 689 P.2d 1065 (1984):

> Under Washington law, State troopers may not conduct a routine inventory search following lawful impoundment of a vehicle without first asking the owner, if present, if he will consent to the search.

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[4] Further, the "local procedures" violated in *Wanless* required police to allow an arrestee "to reject the protection that an inventory search provides," and make alternative arrangements for the safety of his personal property. 882 F.2d at 1463.

In the case *sub judice*, Nagano attempted to give Pelekai his briefcase for safekeeping at the scene of his arrest, and Honolulu Police refused. That refusal violated federal, Hawaii and Washington State law.

Wanless, 882 F.2d at 1463, *citing Williams*.

The Ninth Circuit's *Wanless* holding was cited and followed in *United States v. Johnson*, 936 F.2d 1082 (9th Cir. 1991), where the court suppressed evidence obtained in violation of Washington Supreme Court authority:

> The failure to comply with governing state procedures renders the search of the trunk of Johnson's car unconstitutional as a matter of federal law under *Opperman* and *Wanless*.

Johnson, 936 F.2d at 1084; *see also, United States v. Mancera-Londono*, 912 F.2d 373, 375 (9th Cir. 1990) (*citing* and following *Wanless*); *United States v. Khoury*, 901 F.2d 948, 958 (11th Cir. 1990) (*citing* and following *Wanless*); *United States v. Brady*, 734 F.Supp. 923, 927 n.1 (E.D.Wash. 1990) (*citing* and following *Wanless*). To paraphrase *Johnson*, the failure of Officer Babauta to comply with state procedures rendered the search of Nagano's briefcase unconstitutional as a matter of federal law under *Opperman* and *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974).

In *State v. Ching*, 67 Haw. 107, 678 P.2d 1088 (1984), the Hawaii Supreme Court affirmed its holding in *State v. Kaluna*:

> an inventory search should be rigidly circumscribed in scope, perhaps more so than any other type of justified warrantless search. To the extent that the basic purposes of an inventory search can be accomplished by means which are less intrusive on an internee's privacy, then the constitutional rule of reason requires such means to be employed.

State v. Ching, 678 P.2d at 1091, quoting *State v. Kaluna*, 520 P.2d at 60. The *Ching* court reviewed this Court's opinion in *Illinois v. Lafayette, supra*, decided nine years after *Kaluna*, and the *Lafayette* holding that extended inventory searches to closed containers. The *Ching* court rejected this extension:

> We recognize that in *Illinois v. Lafayette* the United States Supreme Court held that the Fourth Amendment does not require police to use less intrusive means (such as sealing) to safeguard an arrestee's property. 103 S.Ct. at 2610. . . . [I]n *Kaluna* we held that then Article I, Section 5 (now Article I

> Section 7) of the Hawaii constitution *provides greater individual protection from inventory searches than the Fourth Amendment* and requires less intrusive means if feasible. *Kaluna*, 55 Haw. at 369, n. 6, 374, 520 P.2d at 58 n. 6, 61.

State v. Ching, 678 P.2d at 1092, n. 2 (emphasis added); *see also*, LaFave and Israel, 1 *Criminal Procedure* (West 1984) at 251 (characterizing *Kaluna* as "a decision imposing limits grounded in state law that the inventory may not extend to closed containers.")

In *State v. Perham*, 72 Haw..290, 814 P.2d 914 (1991), the Hawaii Supreme Court revisited *Kaluna*:

> [W]e note that the Fourth Amendment to the United States Constitution does not require police to use less intrusive means to safeguard an arrestee's property. *Illinois v. Lafayette*, 462 U.S. 640 (1983). However, in *Kaluna* we held that our state constitutional provision protecting individuals from unreasonable searches and seizures provides greater protection from inventory searches than the Fourth Amendment.
>
> *Kaluna* suggested that an arrestee's belongings could be placed, unopened, into a sealed envelope, or that the arrestee be required to sign a waiver releasing the police of responsibility for the contents of unopened items, thereby affording the arrestee the choice of relinquishing any right of privacy in the contents. *Id.* at 374-75. *See also State v. Ching*, 67 Haw. 107, 112-13, 678 P.2d 1088, 1093 (1984).

Perham, 72 Haw. at 294. "*Kaluna* has never been overruled in its 16-year history[.]" *Id.* The *Perham* court reiterated language in *Kaluna* that prohibited container inventory searches for purposes of deterring police theft or preventing false claims:

> Nor did the need to inventory the defendant's possessions serve as a justification for probing the contents of the packet. The government's interest in protecting itself against fraudulent post-incarceration claims of loss or damage to property is at best a

> tenuous reason for infringing the privacy of an individual's belongings.

Perham, 72 Haw. at 293, *quoting Kaluna*, 520 P.2d at 58.

Kaluna, *Ching*, and *Perham* barred the warrantless inventory search in this case. Officer Babauta violated Hawaii law the minute he opened Nagano's briefcase at the stationhouse. Further, under *Wanless*, *Johnson*, *Mancera-Londono* and *Opperman*, the Ninth Circuit should have adopted the holdings of the Hawaii Supreme Court for purposes of delineating the lawful scope of Babauta's search. If Babauta had complied with "pre-existing, standardized criteria" for local inventory searches he would not have opened Nagano's briefcase, counted money, or "flipped through" his private papers. If Babauta had not read the notebook he would not have seen the "IT" notations or the places and times of ATM deposits.

Absent this strategic information, *Babauta would not have called FBI special agent Roger Kent and Kent would not have dispatched agents to inspect the notebook, place Nagano's family under house arrest, and approach a federal magistrate for search warrants.* Babauta's illegal inventory search supplied the *sine qua non* for the United States' federal search warrants in this case.

It is well-established that:

> [i]f an unreasonable search has been made in violation of the Fourth Amendment, it is not merely the material seized that cannot be admitted in evidence. The government may not use the information thus improperly gained as a means of finding proper evidence. In what the Court has rightly called a "time-worn metaphor," the government is said to be barred from use of "fruit of the poisonous tree."

C. Wright, 3 *Federal Practice and Procedure Criminal 2d*, 792 (West 1982), *citing Silverthorne Lumber v. United States*, 251 U.S. 385 (1920) and *Harrison v. United States*, 392 U.S. 219 (1968). The exclusionary rule is not limited to barring only "physical tangible evidence" derived from illegal entries. *Wong Sun v. United States*, 371 U.S. 471, 465 (1963).

> If there is a direct relationship between an illegal search and the acquisition of subsequent evidence,

> the subsequent evidence will be suppressed. An otherwise legal search or arrest cannot stand if probable cause for it was established only by a prior illegal search.

3 *Federal Practice and Procedure Criminal 2d*, at 793, *citing Brown v. Illinois*, 422 U.S. 590 (1975).

Hence, as the fruit of the Government's illegal warrantless searches of Nagano's briefcase, the information obtained from Nagano's notebook and the observations later made on the basis of this information could not be utilized to establish probable cause for the issuance of agent Kent's search warrants. Without the information that Nagano was in possession of cash and handwritten notes which indicated that he had been recording information about various ATMs and their cash replenishment schedules, and that FBI agents observed certain property in the Aina Haina residence similar to that found at the scene of a 1989 ATM burglary, there was no substantial basis for concluding that evidence of the ATM burglaries would be found in Nagano's briefcase, his car or the Aina Haina and Ewa Beach residences. The FBI did not have probable cause to search Nagano's personal possessions or his residences until after officer Babauta's January 21, 1990, fortuitous telephone call.[5]

The District Court recognized that Kent's affidavits consisted of information which was the poisonous fruit of the government's illegal warrantless searches. However, the court concluded that even if these "offending statement[s]" were "subtracted" from Kent's affidavits, the information supplied by the two unknown informants identifying Nagano as "the perpetrator of ATM burglaries" provided "ample independent sources of information" to sustain the issuance of the search warrants. *See* Appendix B at 22, 24. The Ninth Circuit's Opinion affirmed this position. *See* Appendix C at 8.

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[5] FBI agent Sugimoto, who "detained" Nagano's Ewa Beach residence before the search warrant arrived, testified at the suppression hearings that he was involved in the ATM burglary investigations since November 1989 and that Nagano was not a suspect in the burglaries until January 31, 1990, the day after his arrest by officer Minic. RT 5/3/90:134-35.

Where an application for a search warrant is based upon information supplied by an informant, the value of the information must be evaluated in light of the "veracity" and "basis of knowledge" of the informant. Evaluation of these factors are to be applied in a common-sense, practical manner. *Illinois v. Gates*, 393 U.S. at 238;[6] *see also United States v. Estrada*, 733 F.2d 683, 685 (9th Cir.), *cert. denied*, 469 U.S. 850 (1984). Relevant considerations include whether the information detailed actual criminal activity, *Illinois v. Gates*, 462 U.S. at 230 and *United States v. Miller*, 753 F.2d 1475, 1480 (9th Cir. 1985), whether the information was based on personal observation, *United States v. Landis*, 726 F.2d 540, 543 (9th Cir.), *cert. denied*, 467 U.S. 1230 (1984), or whether there was corroboration of details of the information by independent police investigation, *United States v. Yarbrough*, 852 F.2d 1522, 1533 (9th Cir. 1988).

Interlocking information supplied by different confidential informants may serve to enhance the credibility of each of the informants. *United States v. Landis*, 726 F.2d at 543. However, the value of the information supplied by each informant, like in all other instances of corroboration of an informant's information, must be evaluated in light of whether the corroboration goes to incriminating activities, or merely innocuous ones. Activities or information innocuous in themselves are entitled to less weight since "a skillful liar would always allege *some* true innocent facts to make his story appear credible." 1 W. LaFave, *Search and Seizure: The Fourth Amendment*, 556, 557 (1978); *United States v. Freitas*, 716 F.2d 1216, 1223 (9th Cir. 1983)[7].

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[6] In *Illinois v. Gates*, the Supreme Court abandoned the rigid two-prong *Aguilar-Spinelli* test for evaluating warrants based upon informer's tips and replaced it with the "totality of the circumstances" test in which the elements of "veracity" and "basis of knowledge" of the informers were "closely intertwined issues that may usefully illuminate the common-sense, practical question of whether there is probable cause to believe that contraband or evidence is located in a particular place." 462 U.S. at 230.

[7] *See also United States v. Jackson*, 544 F.2d 407, 412 (9th Cir. 1976) (Hufstedler, J., dissenting) ("Corroboration of innocuous details will not pass the *Aguilar-Spinelli* test.")

In this case, the information provided by Source #1 identifying Nagano as the perpetrator of the ATM burglaries was clearly entitled to no weight. The source's basis for identifying Nagano as the ATM burglar was that Nagano had lots of money, didn't work, and had locksmith experience. The source's additional information that Nagano had burglarized the Willows Restaurant with Clint Ross, possessed a firearm, carried a police radio scanner, lived part-time with his parents in Hawaii Kai, and lived with a Korean woman, utterly failed to link Nagano to the ATM burglaries. The information provided by Source #2 was likewise entitled to little or no weight. The source's sole basis for identifying Nagano as the ATM burglar was a single hearsay statement by Clint Ross to the source that "Nagano admitted to committing the ATM burglaries." *See* Appendix A. No details were provided which tended to establish the reliability of Ross' hearsay statement.

Although agent Kent believed that both sources were reliable because the information supplied was corroborative of each other, the corroboration only went to the information that Nagano was acquainted with Clint Ross and that both were involved in the burglary of the Willows Restaurant. There was no corroboration of any information linking Nagano to the ATM burglaries. Similarly, the FBI's so-called independent investigation merely corroborated information by the informants that Nagano was a Japanese male, Clint Ross was a suspect in the Willows Restaurant burglary, Nagano had an arrest record, and Nagano owned a motorboat. This information, along with all other information supplied by the sources, consisted of a list of innocuous activities and information which utterly failed to provide any basis for concluding that Nagano was the perpetrator of the ATM burglaries.

Based upon the information provided by the unidentified sources, and in the absence of the information obtained as a result of the warrantless searches of Nagano's briefcase, there was no substantial basis for concluding that evidence of the

ATM burglaries sought in Kent's search warrants would be found in Nagano's briefcase, car or residences.

Appendix A has been highlighted to show the information obtained by Agent Kent because of Officer Babauta's January 31, 1990, illegal inventory search and telephone call. The Ninth Circuit's April 9, 1992, Opinion described "the briefcase with $17,000 in cash . . . recovered from Nagano during his arrest" as a "crucial fact" in its decision to find probable cause after redacting the notebook information from the search warrant affidavits. Appendix C at 8. Without the $17,000 found in Nagano's briefcase, and the "IT" notations in the ledger notebook, the search warrant affidavits did not contain probable cause sufficient to search Nagano's briefcase, car or residences.

Point 2: **THE NINTH CIRCUIT'S OPINION IGNORED THIS COURT'S HOLDING IN *FLORIDA V. WELLS*, WHICH PROSCRIBES WARRANTLESS INVENTORY SEARCHES BY STATE OFFICIALS WHEN THEY ARE CONDUCTED WITHOUT PRE-EXISTING WRITTEN POLICY OR ESTABLISHED PROCEDURES.**

In its April 9, 1992, Opinion, the Ninth Circuit Court of Appeals invalidated Officer Babauta's warrantless inventory search of Nagano's ledger notebook, saying "the later examinations of the notebook were investigatory in nature and should not have been conducted without a warrant." Opinion at 7, *citing, United States v. Khoury*, 901 F.2d 948, 958-60 (11th Cir. 1990). The court ignored, however, the Eleventh Circuit's equally relevant discussion of *Florida v. Wells*, 495 U.S. 1 (1990), this Court's most recent discussion of warrantless inventory searches by state officials:

> [t]he policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into a " 'purposeful and general means of discovering evidence of crime.' [*Colorado v.*] *Bertine*, [479 U.S. 367] at 376[.]" *Florida v. Wells*,

> [495 F.2d 1, 4 (1990)]. *Conspicuously absent from the testimony at the suppression hearing is any evidence concerning the standardized procedures limiting the discretion of the investigating officers.* [*citing Wells*].
>
> The appellant does not suggest that the initial inventory search was anomalous or discretionary, and although we are concerned by the paucity of the record as to the standardized procedures, *that issue was not raised and we need not decide it.*

Khoury, 901 F.2d at 958 (emphasis added).

Nagano, however, *did* raise this issue, and the record from Nagano's suppression hearing, like that in *Khoury,* shows a "conspicuous absence" of "evidence concerning the standardized procedures limiting the discretion" of Honolulu Police during station house inventory searches.

Mr. Justice Rehnquist's opinion in *Florida v. Wells* declared:

> [t]he Florida Highway Patrol had no policy whatsoever with respect to the opening of closed containers encountered during an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment and that the marijuana which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida.

495 U.S. at 4-5. "[S]tandardized criteria" and "established routine," observed Chief Justice Rehnquist, "must regulate the opening of containers found during inventory searches." *Id.*

During the suppression hearing in this case counsel tried repeatedly to determine the Honolulu Police Department's policy for closed containers and inventory searches. Honolulu Police Officer Peterson, who seized Nagano's briefcase roadside, admitted there were no regulations concerning confiscation of property at the scene or the opening of closed containers for purposes of inventory searches. RT 4/30/90:19.

"Just common practice," testified Peterson, and "[the officer's] discretion at the time.". RT 4/30/90:20[8].

Honolulu Police Officer Babauta, who conducted the stationhouse inventory search, was not even asked about standardized procedures for such searches. RT 4/30/90:52, 53.

District Court Judge Martin Pence included no findings of fact or conclusions of law about standardized procedures for roadside seizures or station house searches in his May 24, 1990, Order.

In its answering brief filed before the Ninth Circuit, the Government argued the search of Nagano's briefcase was "governed by HPD written policies and established routine." Answering Brief ("AB") at 28. The United States attached hearing exhibit #4 to its supplemental excerpts of record, and claimed HPD's roadside seizure and stationhouse search of Nagano's briefcase were conducted "in accordance with general practice." AB at 29.

The Government is mistaken. No such policies exist now and none existed at the time of Nagano's arrest. The "general policies" declared in Government Exhibit #4 did not offer Honolulu Police, the District Court Judge, the Ninth Circuit panel, or this Court, any guidance whatsoever as to the parameters of roadside or stationhouse inventory searches in Honolulu. As the Government conceded in a footnote in the Answering Brief, Exhibit #4 states:

> All . . . personal effects, such as money, wallets, waist belts, knives and jewelry of all types, shall be removed, inventoried and placed in a property bag which shall be placed in a depository for safekeeping.

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[8] Peterson admitted he had turned over money to bystanders in prior arrests, but insisted that too much money was involved here. RT 4/30/90:22. Although "there's no procedure . . . in [HPD's] manual," said Peterson, "[i]t's the officer's discretion and it's common practice [to confiscate large] sums of money." RT 4/30/90:23.

AB at 29, n.27, quoting Exhibit #4, Supp. E.R. at 73. This "general policy" did not supply the specificity called for by Mr. Chief Justice Rehnquist in *Florida v. Wells*[9].

"Our view," said this Court in *Wells*, "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." 495 U.S. at 4. "The individual police officer," concluded Chief Justice Rehnquist's conservative majority opinion (there were four concurrences filed criticizing the majority), "must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime." *Id.* The "general policy" similar to that offered by the United States in Exhibit #4 in this case was tendered by the Florida Highway Patrol in *Wells*. *See* 495 U.S. at 5-7 (Brennan, J., concurring)[10]. It was rejected by the

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[9] Nothing in Exhibit #4 addressed the opening of closed containers, the reading of personal papers or diaries, or "flipping through notebooks" to find currency or contraband during an inventory search. Nothing in Exhibit #4 permitted an arresting officer to seize a briefcase during a traffic arrest after an arrestee had asked three times that it be left with his passenger.

Asked about the relevance of Exhibit #4 to his decision to seize Nagano's briefcase roadside, Officer Peterson told Judge Pence, "there's nothing in [t]here[.]" RT 4/30/90:20. "In other words," counsel asked Peterson, "there is nothing in this document, any of the general orders, that particularly give[s] you authority to retain it, other than your discretion at the time[?]" *Id.* "Yes, sir," said Peterson. *Id.* "[T]here's no procedure, at least in this manual, that you can impart to this Court," asked counsel, "whereby HPD allows for someone at the scene, with that amount of money, to have it transferred to someone else, is there?" RT 4/30/90:23. "Correct," said Peterson. *Id.*

[10] The Florida Highway Patrol argued, "that Chapter 16 of the Florida Highway Patrol Forms and Procedural Manual contained the standard policy that guided the conduct of the search in this case." 109 L.Ed.2d at 7 (Brennan, J., concurring). "[T]he manual," however, "did not provide any policy for the opening of closed containers." *Id.* In *Wells*, the officer, "thought that opening the suitcase was part of a proper inventory[.]" 109 L.Ed.2d at 8 (Brennan, J., concurring). "Adams' desire to inventory the car stemmed from the fact that there was a large amount of cash lying on the floor of the car when respondent was arrested." *Id.*

Florida Supreme Court and the U.S. Supreme Court because "the instant search was not sufficiently regulated to satisfy the Fourth Amendment[.]" 495 U.S. at 7 (Brennan, J., concurring).

Neither Judge Pence nor the three-judge panel on the Ninth Circuit discussed the pre-existing standardized criteria requirement established in *Florida v. Wells*. While the Ninth Circuit has yet to address *Wells* in a published opinion, *Wells* has been cited and followed in Third, Seventh and Eleventh circuit opinions. In *United States v. Salmon*, 944 F.2d 1106 (3rd Cir. 1991), the Third Circuit applied *Wells* and rejected an inventory search similar to that conducted by the Honolulu Police:

> [b]ased on the lack of evidence of any criteria or established routine regarding the scope of an inventory search, we conclude that the searching officers had impermissible discretion regarding the scope of the inventory, particularly as to the treatment of closed containers.

944 F.2d at 1121, *citing Florida v. Wells*[11]. *See also, United States v. Khoury*, 901 F.2d 948, 958 (11th Cir. 1990) and *United States v. Kordosky*, 921 F.2d 722, 722 (7th Cir. 1991), *cert. denied*, 11 S.Ct. 94, 109 L.Ed.2d 306 (1991).

V.

CONCLUSION

This Court's decisions in *Opperman*, *Bertine* and *Lafayette* made clear that inventory searches may be conducted to protect the owner's property and the police against claims of potential danger. "The individual police officer," however, "must not be allowed so much latitude that inventory searches are turned into a purposeful and general means

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[11] "Detective Eckles testified," observed the *Salmon* court, "that the Westmoreland County Detective Bureau has no written policy regarding inventory searches." 944 F.2d at 1121. "Because the record contains no evidence of a policy regarding the scope of an inventory search, we cannot uphold either of the courthouse searches as a lawful inventory search." *Id.*

of discovering evidence of crime." *Florida v. Wells, supra,* 495 U.S. at 4.

Nagano respectfully requests that this Court grant certiorari, call for full briefing on the merits, set aside the decisions of the District Court and the Ninth Circuit Court of Appeals, and suppress the evidence obtained from Nagano's briefcase, car and residences after his traffic arrest in violation on January 31, 1990.

DATED January 20, 1993, in Honolulu, Hawaii.

Respectfully submitted,

WILLARD J. PETERSON
PETER VAN NAME ESSER
(Counsel of Record)
Attorneys for Petitioner
Clint Nagano

APPENDIX A

United States District Court

_____ DISTRICT OF HAWAII

In the Matter of
the Search of

(Name address or brief description of person, property or premises to be searched)

One brief case, imitation black leather with brass trim, with an imitation black leather handle, currently in the custody of HPD as the personal property of Clint Nagano

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

CASE NUMBER: 90-0047MT

(Filed Jan. 31, 1990)

I ROGER T. KENT being duly sworn depose and say:

I am a(X) Special Agent of the Federal Bureau of Investigation (Official Title) and have reason to believe that [ ] on the person of or [X] on the property or premises known as (name, description and/or location)

in the _____ District of Hawaii

there is now concealed a certain person or property, namely (describe the person or property to be seized)

See attached Affidavit of Roger T. Kent

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure) property that constitutes evidence of the commission of a criminal offense, the fruits of crime, or

things otherwise criminally possessed, or property designed or intended for use or which is or has been used as the means of committing a criminal offense.

concerning a violation of Title 18 United States code, Section(s) 2113.

The facts to support a finding of Probable Cause are as follows:

See attached Affidavit of Roger T. Kent

Continued on the attached sheet and made a part hereof. [X] Yes [ ] No

/s/ Roger T. Kent
Signature of Affiant

Sworn to before me, and subscribed in my presence

JAN 31 at _____
Date City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

AFFIDAVIT

Your affiant, Special Agent Roger T. Kent, first being duly sworn, deposes and says as follows:

1. I am a Special Agent of the Federal Bureau of Investigation assigned to the Honolulu Field Office since May, 1971, and I have been an FBI agent since March, 1966. During my twenty-four years of experience I have worked on numerous bank robbery and burglary investigations.

2. Since January, 1988, I have been investigating a series of break-ins and thefts from automatic teller machines (ATM) in Honolulu and Kaneohe (hereafter the "ATM Burglaries"), as follows:

A. On 12/23/83, the ATM located inside Honfed Bank, Temple Valley Shopping Center, Kaneohe, was opened, and a padlock was cut off a reserve money drawer. No money was taken.

B. On 12/14/84, the ATM located at Sears, Ala Moana Shopping Center, was opened and $91,700 in cash was stolen.

C. On 12/20/85, the ATM located inside Hauoli Store, Kaneohe Bay Shopping Center, was opened, and $75,260 in currency was taken. Upon receiving notification by Honfed that a theft was occurring, three Hauoli Store enployees observed a light complected Japanese male, short (Approximately 5' 1" to 5'3"), in his early thirties, enter and exit the ATM enclosure carrying a black tool bag.

D. On 7/2/87, $77,140 in currency was stolen from the ATM located inside the Honfed Bank, Koko Marina

Shopping Center. A rust colored Toyota station wagon, four door, early 1980's model, was observed parked behind the bank at the time of the burglary, and it was gone immediately afterwards. Based on the sequence and timing of events, the FBI believed the car to have been the one used by the burglar.

E. On 11/30/89, the ATM at Hauoli Store, Kaneohe Bay Shopping Center, was entered and $138,190 was taken. *The burglar used a step ladder to enter a crawl space, and left an orange extension cord at the scene, one end having the insulation stripped from it.*

3. In investigating these cases and reviewing past investigations and files, your affiant observed that all the thefts had been committed with knowledge of the combinations to the ATMs, and, in most cases, use of keys available only to a group of Honfed employees called "ATM servicers," whose job included replenishing the machines with money, etc.

4. In September, 1988, information developed which identified a former Honfed servicer, Frank Akhay, as being involved in the theft from the Sears ATM on 12/14/84. The description of this employee did not match the description of the thief as observed by the Hauoli Store employees during the 12/20/85 theft. The employee denied involvement in the theft, and he did not own a car similar to the one observed at the time and location of the 7/2/87 Hawaii Kai theft.

5. After the second Hauoli Store ATM theft, 11/30/89, a reward of $25,000 was offered by banking officials. The reward was published in the Honolulu newspapers in early December, 1989, and resulted in two

individuals coming forward to the FBI and providing the information as follows.

6. Source #1 advised he has known a Japanese male named Clint Nagano for over ten years, and said he suspected Nagano was the individual committing the ATM Burglaries because he always had a lot of money, did not work, and had locksmith experience. The source said Nagano was a close friend to Clint Ross, and that Nagano and Ross had burglarized the Willows restaurant a year or so ago, when Ross' then girl friend, Jayne Olds, who had been an assistant manager of the restaurant, had given out the combination and alarm information to the Willows safe to Ross.

7. Source #1 further advised that Nagano sometimes lives with his parents in Hawaii Kai, and may be living with a Korean bar girl in Ewa Beach. The source advised that Clint Ross told him that Nagano is in possession of a MAC-10 automatic or semi-automatic pistol, which Ross arranged for Nagano to borrow, but which Nagano still has in his possession. Source #1 advised that Nagano often carries a portable police radio scanner to monitor police activity and assist him in his criminal activities generally.

8. Within a few days of Source #1, Source #2 advised your affiant of virtually the same information as Source #1. Source #2 said he is a close friend of Clint Ross, and that Ross has confided in him that he and Nagano committed the Willows burglary, and that Ross told him that Nagano admitted to committing the ATM Burglaries, In mid-November 1989, Nagano, Ross, and Source #2 were together at Ross' place of employment.

Source #2 has advised the FBI that at this meeting, Nagano asked Ross for a pistol, and that Nagano stated to Ross that he wanted to take a pistol with him when he pulled off his "annual Christmas burglary." Ross in turn asked Source #2 to provide the pistol per Nagano's request. Although Source #2 did not provide the pistol, he understood Nagano to be referring to the ATM Burglaries when he referred to Christmas burglaries.

9. Your affiant believes both Sources to be reliable. It is believed that the two Sources are unaware of each other's cooperation, yet the information that each has provided tends to corroborate the other. Details of their information have also been corroborated by subsequent events, as noted below.

10. Your affiant has been advised by other FBI agents conducting various aspects of this investigation, that information from available sources – including records of the Honolulu Police Department and Honolulu FBI – identified Clinton Mitsuaki Nagano, date of birth August 8, 1957, a Japanese/Caucasian male, 5'3" to 5'5" tall, HPD A-96456, as possibly residing currently at his parents' address, 432 E. Hind Drive, Aina Haina. An HPD photograph of Nagano was shown to both sources, supra, and each identified the photograph as the Clint Nagano he was talking about. HPD records indicated that Nagano had been arrested about ten times for various crimes ranging from burglary to theft to drunk driving. No convictions for the theft-type crimes were noted. An HPD report was located regarding the Willows burglary referred to above. The report names as suspects, Clint Ross, Jayne Olds, and a short, light-complected Japanese male seen with Ross at the restaurant the day before the

burglary. The case is presently unsolved according to HPD records.

11. Hawaii state auto registration records showed that Clint Nagano was the registered owner of 1983 Toyota station wagon, license DDA 079.* Spot checks and limited surveillances of 432 E. Hind Drive revealed this Toyota station wagon to be parked in front of a new-appearing carport. The station wagon was bronze colored, similar to the car observed at the Hawaii Kai ATM theft on 7/2/87. Also observed at the house was a motorboat, racing type, on a trailer in the new carport. Source #1 had previously advised your affiant that Nagano had owned several boats, and that he currently owned a speed boat which he kept at his parents' house, and that Nagano had paid cash for the boat. The source also said that Nagano had had the carport built to protect his boat.

12. Your affiant has personally observed 432 E. Hind Drive to be a one story single family wooden house, beige in color with a dark asphalt shingle roof. The original carport is at the right side of the front of the house as you face the house from the street, and the newer, stucco carport is at the left side of the front of the house.

13. At 1 a.m., 1/31/90, your affiant was called by HPD officer Jesse Babauta, receiving desk, HPD, and advised that Clint Nagano had just been arrested on traffic charges, and discovered in his possession was a

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*The underlined portions show that evidence obtained as a direct result of Honolulu Police Officer Jesse Babauta's unconstitutional stationhouse inventory search of the briefcase, and the subsequent telephone call to Special Agent Kent.

briefcase containing $17,000 cash and handwritten notes indicating that Nagano had been recording information about various ATMs and their cash replenishment schedules. I have been advised that the briefcase is black in color, made of imitation leather, with a black handle and brass trim, and is currently being held by the Honolulu Police Department as personal property belonging to Clint Nagano.

14. FBI agents Greg Gilmartin and Margaret Faulkner interviewed Nagano at the HPD jail and reviewed the arrest report and other documents relating to the arrest. Nagano did not confess to committing any of the ATM Burglaries, but did state that he was a locksmith, made keys at the E. Hind Drive address where he lived part-time with his parents and where he kept his money. Nagano maintained, however, that he had all his cash with him when he was arrested. He said he had three or four thousand dollars in several bank accounts, and that he lived part of the time with his girlfriend in her house at 91-805 Aaha St., Ewa Beach. Nagano said he paid his girl friend $300 per month for rent. Special Agent Gilmartin advised your affiant of the above, and that Nagano had been arrested at Lewers and Kalakaua, Waikiki, by HPD patrol. Nagano was accompanied by his girlfriend, Ki Soon Pelekai, Korean female, date of birth 4/8/35, who was not arrested. In Nagano's notebook was the telephone number of Clinton Ross and Source #1.

15. Special Agent Sugimoto has advised your affiant that 91-805 Aaha Street, Ewa Beach, is a one-story single family wooden house, painted light blue, and the address is on the mailbox in front of the house. There is a carport at the front of the house.

16. Special Agent Lee Sugimoto has advised your affiant that Ki Soon Pelekai told him this morning that Clint Nagano spent nights at the Aaha Street house, and paid rent of $300 per month. He had a room in the house which was for his individual use. Pelekai also said that she thought Nagano had obtained the $17,000 at his father's house. She also said they had spent the evening looking at Porsche automobiles, and that Nagano spent considerable time talking to a salesman. She said she didn't know what Nagano did in the way of gainful employment, and thought he got money from his father.

17. Special Agent Appelbaum has advised your affiant that he proceeded to 432 E. Hind Drive, the Nagano residence, and knocked on the door about 5:45 a.m. this morning. SA Appelbaum was allowed entry to the house by Masakazu Nagano, the homeowner. As SA Appelbaum entered the house, he observed a stainless steel step ladder and two red rubber pedestrian cones, similar to the items observed at the time and location of the 11/30/89 ATM burglary. Masakazu Nagano stated that Clint Nagano had obtained the ladder and cones approximately two months ago, which coincides with the time of the 11/30/89 ATM burglary. Masakazu Nagano further pointed out areas of the house used and frequented by Clint Nagano including a locked tool cabinet, property in the family room, and Clint's bedroom. Alice Nagano, Clint Nagano's mother, pointed out several areas of the house where Clint spent time, including the attic. SA Appelbaum also observed many hand tools and several extension cords (including at least two orange ones of the type employed in the 11/30/89 burglary) on the premises.

18. Special Agent Dan Kelly advised your affiant that he proceeded this morning to 91-805 Aaha Street, Ewa Beach, where he had a conversation with Ki Soon Pelekai's daughter and mother, who revealed that they had observed Clint Nagano at the Aaha Street house with a portable radio scanner.

19. During the course of my 24 years as an FBI agent involved in the investigation of bank robberies and burglaries, I have participated in searches of the vehicles of suspects. In my experience, suspects frequently keep the tools they used in the bank crime in their vehicles, often with other tools. In addition, they frequently stash some of the proceeds of the crime in secret locations within their cars.

20. I have also been involved in investigating bank crimes involving the use of keys. In my experience, the manufacturing of illicit keys generally involves specialized key making equipment and the techniques involved require trial and error methods that generate key impressions, diagrams, and other paraphrenalia [sic].

21. Based on the investigation to date, and my experience in cases of this type, there appears to be more than one individual involved in the ATM Burglaries, including, among others, employees of Honfed Bank with access to keys, ATM combinations, cash replenishment schedules and the like. In my experience, bank crime suspects frequently maintain the names and addresses of such accomplices in their personal telephone directories or lists, which are frequently kept in their briefcases.

22. I believe, based on my training and experience, that property which constitutes evidence of commission of the ATM Burglaries, the fruits or instrumentalities of

crime, and property which has been or was intended to be used in the commission of crimes, will be found in the briefcase described in Paragraph 13 as follows:

(a) The briefcase itself;

(b) Cash proceeds of the ATM Burglaries, including $17,00 in cash;

(c) Notes, diagrams, and other written materials relating to Automatic Teller Machines and their cash replenishment schedules;

(d) Telephone and address books containing the names, addresses and phone numbers of associates;

(e) Evidence showing ownership or control of the briefcase, examples of which include: financial records, bills, receipts, rental agreements or contracts, letters, correspondence, photographs, tapes, cancelled checks, money order receipts, personal items, items of clothing or shoes, *notebooks*, diaries and identification materials such as driver's licenses, passports, birth certificates, military identification, and the like.

FURTHER AFFIANT SAYETH NAUGHT

Dated: January 31, 1990, at Honolulu, Hawaii.

/s/ Roger T. Kent
ROGER T. KENT, Special Agent

Subscribed and sworn to
before me this 31st day of
January, 1990

UNITED STATES MAGISTRATE

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLINT NAGANO, Defendant-Appellant.	No. 91-10055 D.C. No. CR-90-00287-HMF **MEMORANDUM*** (Filed Apr. 9, 1992)

Appeal from the United States District Court
for the District of Hawaii
Martin Pence, District Judge, Presiding

Argued and Submitted January 13, 1992
San Francisco, California

BEFORE: GOODWIN, FLETCHER, and BRUNETTI, Circuit Judges

Clint Nagano appeals his conviction on bank burglary and larceny charges. He claims the district court erroneously denied his motion to suppress evidence that he claims was seized in violation of the Fourth Amendment. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit rule 36-3.

I. BACKGROUND

On the evening of January 30, 1990, Honolulu police arrested Nagano for several traffic violations. During a search of Nagano's briefcase, police discovered a large amount of cash and a notebook with notations that suggested a link between Nagano and a series of automatic teller machine burglaries.

For some time, the FBI had suspected Nagano of involvement in the burglaries. Based on evidence they had obtained earlier and on information discovered in the briefcase and notebook, the FBI obtained warrants to search the briefcase and two residences. During those searches, the FBI collected evidence implicating Nagano in the burglaries.

Nagano was indicted for charges related to the teller machine burglaries. At a suppression hearing, the district court concluded that the searches of the briefcases and the residences did not violate the Fourth Amendment.

Nagano entered a conditional plea of guilty pursuant to Federal Rule of Criminal Procedure 11(a)(2) and reserved his right to appeal the district court's denial of his motion to suppress evidence.

II. ANALYSIS

A. The search at the scene of Nagano's arrest

Nagano first argues that the district court erred by not suppressing evidence that police discovered when they looked inside the briefcase they found in his car.

We review the legality of a search de novo. We accept the district court's factual findings related to its legal determinations unless the factual findings are clearly erroneous. *See United States v. Linn*, 880 F.2d 209, 214 (9th Cir. 1989).

Police may lawfully search an automobile and any closed containers within the passenger compartment without a warrant when the search is made "as a contemporaneous incident of [the] arrest" of an occupant of the automobile. *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Parr*, 843 F.2d 1228, 1229 (9th Cir. 1988).

Nagano claims the search was improper because he was not under arrest when police searched the briefcase. In *Parr*, we determined that a motorist stopped for suspicion of driving with a suspended license and then detained in the patrol car was not under arrest, and so a search of the passenger compartment of his car while he was detained was not justified under *Belton*. 843 F.2d at 1231.

In *Parr*, the police officer ordered the suspect to remain in the patrol car while the officer searched the car and a gym bag he found in the car. Only after discovering a sawed-off shotgun, a shotgun shell, and stolen mail did the officer issue the defendant a citation for driving with a suspended license and unlawful possession of a firearm. The defendant was then released. We found that no arrest had occurred. We observed that while there is no bright-line test for determining when an investigatory stop becomes an arrest, a detention may become an arrest at the point a suspect is transported to the police station. *Id.* at 1231.

Nagano, unlike the defendant in *Parr*, clearly was under arrest before police examined the contents of his briefcase. Officer Jean Minic testified that she placed him under arrest and handcuffed him after she learned that his license was suspended. She said her decision to arrest him rather than to issue him a citation was based in part on his seemingly impaired condition and his companion's statements that he was taking Valium. Other officers confirmed her version of events.

Minic testified that after she arrested Nagano, she asked him if he wanted to take anything with him to the police station. She said he told her he wanted to take a briefcase that was in the car because it contained a substantial amount of money. Minic said she told Nagano the officers would have to look inside the briefcase to confirm the presence of the currency and to inspect the briefcase for explosives.

The officers opened the briefcase and quickly inspected its contents. This search occurred after Minic arrested Nagano, according to the officers' testimony. The district court in its order denying suppression stated that it "finds the testimony presented by Honolulu Police Department Officers Minic, Tong, Peterson and Babauta to be more credible testimony relative to the events which transpired on the night [of the arrest]."

This credibility determination was not clearly erroneous, and according to the officers' testimony, Nagano was under arrest before the briefcase was searched. The search therefore was incident to Nagano's arrest and thus constitutionally permissible.

Nagano argues that the district court found that Nagano was not arrested until after the search of the briefcase. While the district court in its order denying suppression discussed the search before it discussed Nagano's arrest, this order of discussion does not amount to a factual finding regarding chronology.

The district court explicitly found the officers' testimony to be more credible; the officers' testimony was unanimous on the chronology of the arrest and the search. The record supports a finding that the search was incident to arrest and the judge did not err in denying suppression of evidence discovered during that initial search.

B. The decision to seize the briefcase

When the police arrested Nagano, he initially asked that they bring his briefcase with him to the police station "because it had a lot of money in it." After police confirmed that the briefcase contained cash, Nagano changed his mind and asked that they give it to his companion Kil Soon Pelekai, who was not under arrest. The police declined.

Nagano argues that the police were not justified in seizing the briefcase because Pelekai was willing to take custody of it at the arrest scene. The police, however, were aware the briefcase contained a large amount of cash. They did not know Pelekai's relationship to Nagano. The police were faced with the prospect of turning over the briefcase full of cash to a person who apparently was simply going to walk away from the scene.

In those circumstances, it was reasonable for the police to confiscate and inventory the contents of the briefcase in order to deter theft and false claims. *Illinois v. Lafayette,* 462 U.S. 640, 646 (1983).

C. The inventory search at the police station

Nagano claims the search of the briefcase and its contents at the station house exceeded the scope permitted by the inventory exception to the search warrant requirement.

Inventory searches do not require warrants and do not need to be supported by probable cause. Instead, police station personnel may search items in the possession of arrested persons for administrative reasons. "A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." *Lafayette,* 462 U.S. at 646. Inventory searches also may protect the police from dangerous articles in the possession of arrested persons. *Id.*

At the police station, Officer Jesse Babauta counted $17,000 in the briefcase and testified that he flipped through a notebook he found in the briefcase to see if it contained any more money. Babauta noticed the letters "IT" marked next to notes of times and locations. Because Babauta had participated in an investigation of thefts from several automatic teller machines, he recognized that "IT" could represent the "Instant Transfer" automatic teller machine network. He testified he then checked for other similar pages.

It was reasonable for Babauta to count the money. *See U.S. v. Johnson*, 820 F.2d 1065, 1072 (9th Cir. 1987) (currency found in suspect's pocket counted and placed in envelope for safekeeping). It also was reasonable for Babauta to leaf through the notebook to see if anything was stuck inside. *See United States v. Khoury*, 901 F.2d 948, 959 (11th Cir. 1990).

The problem, however, is that Babauta searched the notebook more thoroughly when he noticed the ATM notations. Babauta testified that once he saw the ATM notations on a page, "I proceeded to check if there were any other pages that were similar to this page."

The record also shows that Sergeant Kevin Kamatoto opened the notebook and showed it to FBI agents. While Babauta's initial cursory examination of the notebook was part of a proper inventory search, the later examinations of the notebook were investigatory in nature and should not have been conducted without a warrant. *See Khoury*, 901 F.2d at 958-60.

D. The search warrants

The FBI used information obtained from the improper notebook search in affidavits used to obtain warrants to search the briefcase and its contents and two residences. We therefore consider the issue of whether the warrants would have been properly issued if the affidavits had not contained the information that was improperly obtained.

Nagano argues that without considering the fruits of the purported inventory searches, the magistrate would

not have found probable cause to issue the warrants. We disagree.

"When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue." *United States v. Alexander,* 761 F.2d 1294, 1300 (9th Cir. 1985) (quoting *James v. United States,* 418 F.2d 1150, 1151 (D.C. Cir. 1969)).

Information improperly obtained from the notebook was contained in affidavits supporting the application for each of the three warrants. The pertinent information stated that Officer Babauta told the FBI that when Nagano was arrested on traffic charges, he had in his possession "handwritten notes indicating that Nagano had been recording information about various ATMs and their cash replenishment schedules." When this information is redacted from each of the three affidavits, the affidavits still justify the issuance of search warrants.

Each of the affidavits described the teller machine thefts and the large amounts of currency stolen in those thefts, summarized information implicating Nagano in the thefts from confidential informants considered reliable by the FBI, and described how the briefcase with $17,000 in cash had been recovered from Nagano during his arrest.

With the other information provided in the affidavits, these crucial facts provided the probable cause necessary to issue the warrants to search the briefcase and its contents and the two residences.

The district judge properly found that the fruits of those searches, including the information from the notebook, should not have been suppressed.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATED [sic] OF AMERICA, Plaintiff, vs. CLINT NAGANO, Defendant.	CR. NO. 89-00287 HMF ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (Filed May 24, 1990)

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

This matter came before this court on a motion made by the defendant to suppress evidence obtained in allegedly unconstitutional searches and seizure of his property and automobile along with the fruits of the evidence obtained in those searches. This court, having reviewed the pleadings and having heard evidence and arguments of counsel presented at hearings conducted on April 26, 1990, April 30, 1990, May 3, 1990, and May 17, 1990, now denies the defendant's motion.

I. Factual Findings

The court has heard a number of witnesses relate varying versions of the events which ultimately resulted in the seizure of the evidence which the defendant now seeks to suppress. The court finds the testimony presented by Honolulu Police Department Officers Minic, Tong, Peterson and Babauta to be the more credible testimony relative to the events which transpired on the night of January 30 - 31, 1990, and the testimony of FBI Special

Agents Applebaum, Faulkner, and Kent to be the more credible testimony relative to the various encounters between those agents and Mr. and Mrs. Masakazu Nagano and Ms. Kil Soon Pelekai and the searches of their respective residences. Accordingly, the court adopts the following as a rendition of the relevant facts which relate to the defendant's motion:

On January 30, 1990 the defendant was driving his car, a yellow Toyota station-wagon, in Waikiki. He was accompanied by his girlfriend, Kil Soon Pelekai ("Pelekai") (in whose home he also stayed). Officer Jean Minic ("Minic") was patrolling in the area on her Cushman police cart. About 11:30 p.m., Minic was going in a kokohead direction on Kalakaua Ave. behind the Toyota. At Lewers Street, which crosses Kalakaua Ave. at right angles, there is a sign which says, "No Right Turn On Red". The red light was on; nevertheless, the Toyota turned right. The intersection is very well-lighted, and Minic saw that the driver had no seat belt on. Minic made a right turn to follow.

An Oriental male waved her down, pointed to the Toyota, and said that sometime earlier on Lewers at Don Ho Lane, the man in the Toyota had called him over to the car and asked him about drugs and showed him a briefcase with a large amount of money in it. The male refused to give his name and immediately left the area.

The Toyota had slowed to about 10-15 mph, so Minic resumed following the Toyota. It turned left into the Royal Hawaiian area and stopped. Minic stopped behind that car and called the dispatcher regarding the type of vehicle and its number.

Waikiki is heavily patrolled by the police at night, and Officer Calvin Tong heard Minic call the dispatcher. Being nearby, he drove over to join Minic.[1] Minic was on the driver's side, Tong on the passenger's side. Minic told the driver (defendant Nagano) that she was stopping him because of his violation of the red light no-turn and no seat belt.

Using a flashlight, Minic made a visual search of the interior of the Toyota through an open window. At the left of Nagano's foot she saw what appeared to be a revolver on the floor. She told Tong there was a gun inside. Tong, on the other side of the car, moved forward alongside the hood, pulled his own gun, and told Nagano and the woman passenger (Pelekai) to keep their hands where he could see them. Minic ordered Nagano out of the car and told him to put his hands on the car. He was then patted down.

Officer Minic noted that the defendant moved slowly in exiting the car. (She testified that later Pelekai told her that the defendant was on valium.) They (Tong and Minic) then handcuffed the defendant and ordered him to sit on the ground.

Officer Lee and Sergeant Peterson also came to the scene. Nagano told Minic that it was a starter pistol. When Minic retrieved it from the floor, she found that Nagano's statement was true, and so told Tong.

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[1] Although her report, attached as an exhibit to the Government's Brief, states that two other HPD officers, Officers J. Lee and C. Tong were also present at the scene, she apparently made the initial stop.

The officers ordered Pelekai out of the car, asking her about drugs. She replied that they had no drugs. The officers then began to search the car. They eventually searched the passenger compartment, the glove compartment, and the trunk. They also searched Pelekai's purse and opened a velcro-sealed bag which contained vitamins, protein powder, napkins, spoons, and water.

A locked briefcase (attache type) was sitting on the back seat of the car. According to Officer Minic, when asked to do so, the defendant opened the briefcase, displaying the contents of the briefcase to her. She noted that a large quantity of paper money was in the case, though she did not examine the other contents of the case. When asked why he had so much cash, the defendant replied that he and Ms. Pelekai had just come from a Porsche dealer where they had been looking for a car and they had taken the cash along to make an offer on a car.

When Minic asked Nagano to produce the no-fault insurance and registration documents for the car, he said he was driving the car of a friend and he didn't have any of those documents. When the license plate was called in to the dispatcher, a check revealed the car was registered in Nagano's name. When requested to produce his driver's license, he showed only a Hawaii State ID.[2] Minic then called the dispatcher and found that Nagano's license had been suspended and that he had no license to drive the car, so Minic arrested him for driving with a suspended license, driving without a no-fault insurance

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[2] Pelekai had no driver's license. Although both she and Nagano were ordered to sit down alongside the car, so that neither could run, she was never arrested.

card or registration, driving without seatbelts, and for an illegal right turn.

The defendant then requested that he be allowed to take his briefcase with him because he had a lot of money in it. Officer Minic informed him that in order to transport the briefcase they would have to inspect the contents to make sure there were no guns or explosives in it. The defendant then requested that the case be given to Ms. Pelekai.[3] Officer Peterson, who by this time had arrived on the scene, made the decision that the case should not be released to Ms. Pelekai as her identity and relationship to the defendant was unknown at the time, and he felt it would be imprudent for the police to release the case to her knowing that it contained such a large quantity of cash.

The defendant was taken to the police station and booked at which time his property was inventoried, including his briefcase. A search of the defendant's briefcase revealed the cash and a ledger type notebook. HPD Officer Jesse Babauta conducted the inventory; in doing so, he counted the bundled and wrapped packets of bills and found the briefcase to contain $17,000. He then flipped through the notebook, to determine whether or not there was any more money in it. While doing so, Officer Babauta noticed the notation "IT" displayed prominently alongside time and location notes on two of the pages at the latter part of the notebook. Officer Babauta had previously assisted the FBI in an ongoing

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[3] Pelekai had already been told she could go and was walking away from the scene.

investigation into several robberies of automatic bank teller machines. Based on that experience, he knew that one of the ATM networks used by banks in Honolulu is the "IT" or "Instant Transfer" network.

At approximately 1:00 a.m., on instructions from his supervisor, Officer Babauta called FBI Special Agent Roger Kent at home, informing him that HPD had arrested a Clint Nagano and what appeared in Nagano's notebook. Kent came to the station, picked up the briefcase and took it to a federal magistrate the next day seeking a warrant to search the defendant's car and briefcase, the home of the defendant's parents and Ms. Pelekai's home. Agent Kent's affidavit in support of his request for a warrant maintains that the briefcase contained:

> $17,000 cash and handwritten notes indicating that Nagano had been recording information about various ATM's and their cash replenishment schedules.

Government Exhibit 6-C, Affidavit of Agent Roger Kent, attached to Search Warrant, ¶ 13.

The defendant had been under suspicion by the FBI for some time previous to his arrest as the perpetrator of some of the robberies that the FBI had been investigating. Two separate informants had named Nagano as the robber in of [sic] some of those robberies. This information was also included in Agent Kent's affidavit. *See* Government Exhibit 6-C, Affidavit of Agent Roger Kent, attached to search warrant, ¶¶ 5-9.

FBI agents then went to the defendant's parents' home in Aina Haina, where he also sometimes stayed,

and waited on the road in their car until morning. At approximately 6:00 a.m., when Masakazu Nagano, the defendant's father, came out of the house to go to work, the agents stopped him, told him they were seeking a search warrant which they expected any minute and requested that they be permitted to sit inside Nagano's home until the warrant arrived. Mr. and Mrs. Nagano allowed the agents to remain inside their home for ten hours without a warrant; the warrant finally arriving at 4:00 p.m. that afternoon.

Other agents travelled to Ewa Beach, to the home of Ms. Pelekai, at approximately 3:00 a.m. that morning. The agents requested entrance and permission to search the residence. Ms. Pelekai, who had returned home but had not retired, granted this request, but they did not search the residence until the warrant arrived late that afternoon.

II. The Present Motion

The defendant has moved for suppression of all evidence obtained from the search of his briefcase, the search conducted at the police station by Officer Babauta, the search of his parent's house, the search of Ms. Pelekai's residence and all other searches conducted pursuant to warrants obtained based on that evidence. The defendant argues that there was no probable cause to search the briefcase since the officers maintain that he was stopped for traffic offenses. According to the defendant, all activity of the FBI following the initial stop of the defendant in Waikiki can be traced to information obtained in the search of his briefcase both at the scene

and later at the police station, searches which he maintains are constitutionally impermissible. Accordingly, all subsequent searches of Ms. Pelekai's and his parents' home were likewise tainted, and any evidence obtained from those searches should be considered "fruit of the poisonous tree."

III. Discussion

There are actually four separate searches or sets of searches at issue here, and different arguments are raised on the part of the defendant and the government with respect to each of the [sic] them. First is the search of the vehicle and the briefcase by the officers at the scene. The second search is the search conducted by Officer Babauta at HPD station. Finally there are the searches of the defendant's parents' home and Ms. Pelekai's home in Ewa Beach. One of these searches could also be bifurcated since the agents originally entered the home of the defendant's parents per their consent, and then afterwards obtained a warrant, though they were present in the home when the warrant arrived. Since there are different arguments with respect to each search, the court will outline and discuss these arguments as they relate to each of the individual searches.

A. The Search at the Scene

With respect to the search of the defendant's car, the defendant argues that this search was conducted without probable cause and prior to the time that the defendant was under full custodial arrest.

The defendant disputes the validity of Officer Minic's story about an anonymous informant who told her about the defendant's drug inquiry prior to the stop. Defendant's counsel accuses the officer of blatent misrepresentation, pointing out that it would be unlikely for an officer who was chasing a moving vehicle to pull over when flagged down by an anonymous male. At best, the defendant concedes that the officer had probable cause to stop him for traffic violations.[4]

Secondly, once the officer had determined the pistol on the floor of the vehicle to be a harmless starter's pistol, the defendant maintains that no probable cause existed to keep him seated and handcuffed on the ground, a position which precluded him from producing his license and registration.

Finally, the defendant argues that notwithstanding the fact that he was in such a position, the officer had not placed him in full custodial arrest. Absent such an arrest, he contends that the search conducted of his car and briefcase cannot be justified as being incident to an arrest.

The government maintains that the search conducted by the officer at the scene was proper as incident to a

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[4] Actually, the defendant's counsel goes further, alleging gross acts of brutality on the part of the officers, claiming that their version of the incident being nothing more than a fabrication to "cover their collective okole's." As this court has found the officers' version of the incident to be more credible than that proffered by either the defendant or Ms. Pelekai, the court has not gone into detail respecting the defendant's accusations of brutality and misconduct and therefore will not deal with the legal ramifications of such allegations.

valid arrest, or as an alternative ground, allowable under the "automobile exception" to the warrant requirement.

New York v. Belton, 453 U.S. 454 (1981) provides that the police may properly search the passenger compartment of an automobile, including the contents of containers found within the compartment. *Belton*, 453 U.S. at 460. The defendant concedes this to be the law, but notes that the *Belton* rule applies to suspects who have been placed under a *full custodial arrest*. The defendant maintains that he had not been placed under arrest at the time of the search, and that therefore the *Belton* rule does not apply. The defendant argues that until Officer Tong radioed police headquarters and determined that the defendant's license was suspended, he could not have been arrested, presumably since no probable cause for an arrest existed.

The defendant points to the case of *U.S. v. Parr*, 843 F.2d 1228 (9th Cir. 1988) as the applicable standard to be followed in these circumstances. In *Parr*, the Ninth Circuit rejected a vehicle search which was conducted under the *Belton* rule. The search took place after a driver was stopped for suspicion of driving with a suspended license. Police ordered the suspect out of his car and into a squad car and then searched his car. After finding drugs in the car, police arrested him and took [the] suspect [who] was only under suspicion of driving without a license.

With this factual basis, the Ninth Circuit concluded that "it is not clear that the police action taken here is the type of 'custodial arrest' necessary to support a search incident to arrest," *citing Belton*, 453 U.S. at 461. Furthermore, the court pointed to *United States v. Thompson*, 597

F.2d 187, 190 (9th Cir. 1979) where they held that a defendant's failure to produce a valid driver's license justified a police request that he sit in the squad car while identification took place. However, this did not amount to a custodial arrest, and thus a search which took place during that time was disallowed. *Id.* at 191.

The *Parr* court cites a number of cases where federal courts have found no arrest even though suspects were placed in varying degrees of restrictive detention. *U.S. v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987); *United States v. Jacobs*, 715 F.2d 1343, 1345-46 (9th Cir. 1983); *United States v. Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982). The court in *Parr* called these "investigative detention," and concluded that searches incident to such detention should be conducted not under the *Belton* standard, but rather, under the standard enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968). The standard in *Terry* is that an officer who observes suspicious behavior may take measures to neutralize the threat of physical harm and conduct an intrusion short of an arrest, i.e., a pat-down for weapons, as a means of protecting himself an others. Obviously, the search conducted here went far beyond that.

While there is no bright-line for determining when an investigatory stop becomes an arrest, many courts, including the *Parr* court, have pointed to "the point of transporting the defendant to the police station." *Parr*, 843 F.2d at 1231.

The defendant contends that he was not placed under arrest until he was transported to the HPD headquarters. As the search of his car and the briefcase occurred prior

to that point, he contends that evidence discovered during that search should be suppressed as violative of the decisions in *Parr* and *Terry*.[5]

The government's view differs markedly from that of the defendant. The government points to the *Belton* standard as complete justification for the officer's conduct. The government characterizes the defendant's position as one which views the search as flawed due to its timing – i.e., the search was invalid because it was *prior* to the arrest rather than *subsequent* to it. However, this court views this as an incorrect paraphrase of the defendant's argument. The defendant's position is more accurately stated as being that no search of the briefcase was proper until the defendant had been transported to HPD headquarters, or at least until he was placed under a custodial arrest, which did not occur under the specific facts of this case until that time.

Notwithstanding this discrepancy, the court notes that there is law which allows for a search to precede an arrest, so long as "the formal arrest follow[s] quickly on

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[5] It is the defendant's contention that once the officers discovered the cash in his briefcase they decided to arrest him and take him downtown, although they cleverly limited their charges at that time to traffic offenses as a means of covering up their premature and improper search of his car. His position is that neither the 'anonymous informant' nor the starter's pistol found in the car justified his arrest or provided sufficient probable cause to search his car and that an automobile search conducted without sufficient probable cause should be rejected, citing *California v. Carney*, 471 U.S. 386, 392 (1985); *U.S. v. Ross*, 456 U.S. 798, 825 (1982); *U.S. v. Vasquez*, 858 F.2d 1387, 1391 (9th Cir. 1988).

the heels of the challenged search of petitioner's person." *Rawlings v. Kentucky,* 448 U.S. 98, 111 (1980). In the Ninth Circuit, if an arrest is based on probable cause which can stand alone apart from the evidence which is produced by a search conducted incident to that arrest, then such a search will be condoned even if it *precedes* the arrest. *U.S. v. Salizar,* 805 F.2d 1394, 1399 (9th Cir. 1986) (*Citing U.S. v. Morgan,* 799 F.2d 467, 469-70 (9th Cir. 1986)).

Under these cases, the government contends that the actual timing of the search of the defendant's car and the briefcase is immaterial relative to the timing of the actual arrest. The government asserts that probable cause existed for the arrest completely apart from any information learned from the search, namely, the five traffic offenses the officer observed the defendant commit. Brief of the Plaintiff, p. 12 n 8. Furthermore, the government attempts to distinguish the *Parr* case, contending that the defendant cannot seriously maintain that he wasn't under arrest at the time of the search of his vehicle, and that therefore the rationale of *Parr* itself demands that the *Belton* standard be applied. The government asserts that the line of cases following *Rawlings v. Kentucky,* cited *supra,* is the controlling line of authority, and that *Parr* should be confined to its specific factual context.

It is clear that if the defendant had been placed under arrest, then *Belton* would allow the search. Notwithstanding the proffer by the government of cases in support of an alternative justification for the search of the contents of the car under the "automobile exception", those cases pertain either to side issues or contain factual patterns which provide much stronger probable cause than existed

here. *Cf., United States v. Johns,* 469 U.S. 478 (1985) (automobile search sustained, but only after officers had received information about drugs, observed an airplane land, vehicle in question drive up to plane and officers detected smell of drugs). Therefore, the critical inquiry is whether or not the defendant had been placed under arrest, and whether sufficient probable cause existed for that arrest apart from that revealed by any searches conducted incident to it.

As indicated heretofore, it is the view of this court, after having heard the testimony of both the officers and the defendant and Ms. Pelekai, that the defendant was placed under arrest prior to the time of his transport to the station. Furthermore, this court is of the view that there existed sufficient probable cause for such an arrest given the defendant's suspended driver's license, his failure to produce registration for the vehicle, or a no-fault insurance card, his lying about ownership of the car, his slow-reaction time to requests made of him and Ms. Pelekai's statement that the defendant was on valium. Based on this conclusion, the proper line of authority which must be applied by this court flows from *New York v. Belton,* 453 U.S. 545 (1981) and its progeny. Under *Belton,* it is clear that the officers were well within the confines of the law when they searched the defendant's briefcase. Furthermore, the Supreme Court has allowed the validity of a search to be tied to an arrest which follows quickly upon the heels of that search, *Rawlings v. Kentucky,* 448 U.S. 98. 111 (1980), and the law in the Ninth Circuit is that such a search would be allowed if the arrest which followed it could stand alone on grounds of probable cause sufficiently attenuated from those

revealed by the search. *U.S. v. Salizar,* 805 F.2d 1394, 1399 (9th Cir. 1986); *U.S. v. Morgan,* 799 F.2d 467, 469 (9th Cir. 1986). This court finds that such independent grounds did exist, and accordingly must deny the defendant's motion to suppress the evidence which was obtained from the search of the defendant's briefcase at the scene of the stop.

B. The Search at the HPD Headquarters.

The defendant next attacks the search of the briefcase which was conducted by Officer Babauta upon the defendant's booking at the HPD headquarters. He maintains that there was no justification for Officer Babauta to open the briefcase pursuant to an "inventory" search, and that to do so violated the explicit enunciation of Hawaii state law by the Hawaii Supreme Court, law which is to be followed in federal courts under facts such as that presented by this case.

The defendant does not contend that the Fourth Amendment prohibits "inventory searches." Such searches have been widely recognized, and specifically upheld by the U.S. Supreme Court in *South Dakota v. Opperman,* 428 U.S. 364 (1976) and *Illinois v. Lafayette,* 462 U.S. 640 (1983). What the defendant does contend is that the procedure followed in this case violates the guidelines for such searches as they have been laid out by the Supreme Court, the Ninth Circuit, and the Hawaii Supreme Court.

The opinion in *Opperman* outlined three reasons for permitting the police to conduct warrantless

"inventories" of automobiles impounded incident to the owner's arrest:

> These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody . . . ; the protection of the police against claims or disputes over lost or stolen property . . . ; and the protection of the police from potential danger. . . .

Opperman, 428 U.S. at 369. (citations omitted). *Accord, United States v. Johnson*, 820 F.2d 1065, 1072 (9th Cir. 1987).

The defendant makes much of language from Mr. Justice Powell, who provided the deciding vote in the *Opperman* case, and other cases and commentary picking up on his opinions, which caution against using these types of inventory searches as a means of investigation. The view presented there is that since these searches are warrantless ones, conducted for reasons divorced from investigation of criminal activity, the intrusive nature of such searches should be circumscribed if it is possible to do so while still meeting the ends for which the search is conducted – namely protection of a suspect's property, and protection of the police.

The court notes with particularity the opinion in *United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978), because it arises from a factual pattern which is similar to the present case, with an officer arresting a subject, and then a subsequent inventory search revealing contraband in a container found in the suspect's clothing, as well as a locked briefcase which was opened as part of that search.

Reviewing the case *en banc*, the Eighth Circuit held that once the police seize luggage or other locked articles of property, thereby reducing it to their exclusive control, warrantless searches of such property cannot be justified as either incident to the arrest or under an inventory rationale. *Schleis, supra,* at pp. 1171-1173 (quoting *U.S. v. Chadwick,* 443 U.S. 1 (1977) at length). The court held that any valid governmental interests served by an inventory search could have been satisfied by inventorying the locked briefcase as a unit. *Schleis, supra,* at pp. 1172-1173.

In the instant case, it is conceivable that the case could have been inventoried as a single unit, without opening it, and that this would have satisfied the criteria of protecting the suspect's property and the police from claims of misappropriation. Furthermore, the defendant contends that even if there was a necessity to check the case for weapons, there was no need to look through the defendant's notebook and examine the notations in it. If a search of the case was desired, there was no exigency which would have prevented the obtaining of a warrant.

In response, the government points out that inventories of a suspect's property upon arrest are well established as an exception to the Fourth Amendment's warrant requirement. *Illinois v. Lafayette,* 462 U.S. 640 (1983). Furthermore, the U.S. Supreme Court has recently ruled that police are under no obligation in conducting an inventory search to use the least intrusive means possible. *Colorado v. Bertine,* 479 U.S. 367, 373-74 (1987).

The government notes that at the time of the booking, the officer's who had made the arrest were aware that there was a large amount of cash in the briefcase.

Given that knowledge, the government asserts that a situation existed which was rife with possibility for claims of pilferage by the defendant.

Turning to the examination of the notebook by Officer Babauta, the government asserts that once the case is opened, the notebooks were in "plain view", and that therefore the officer was permitted to examine them, citing *United States v. Valles-Velencia*, 811 F.2d 1232, 1237 (9th Cir. 1987) (when officer came upon notebooks in a search of a residence not owned or occupied by the defendant, he was permitted to examine them as being in plain view). Obviously, the facts are a bit different here, and the court rejects this contention. To claim that the notations in the notebook were in plain view requires a 3-step logical leap. The first step is that the case is locked (no plain-view there). The second step is an open case, but closed notebook (no plain-view of the information). Third step is leafing through the notebook. This is far different from coming across a notebook in a home where a defendant could profess no reasonable expectation of privacy. It is true that often operative terms in legal tests are somewhat malleable, but to stretch 'plain view' this far would distort it beyond recognition.[6] While the court has examined the Second Circuit case of *United States v. Arango-Correa*, 851 F.2d 54 (2d Cir. 1988), that case presented much more egregious facts than the instant case,

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[6] This court has no intention of providing a potential defense against charges of voyeurism based on the contention of some potential defendant that his subjects were conducting their activities in 'plain view.'

and thus is inapposite authority to support the government's position.

However, notwithstanding the rejection of the 'plain view' theory, this court remains of the opinion that there was no violation of the defendant's rights simply by the police conducting an inventory search. The rationales behind inventory searches which were outlined in the *Opperman* decision all serve to justify the procedure which was conducted at the HPD station. First, Officer Minic had already learned that the briefcase contained a large amount of cash, though she was unaware of how much cash. In that situation, not only were the police justified, but they would have been imprudent not to count the money so as to guard both the defendant's interest in the protection of his property, and the police department against possible claims of theft.

Secondly, as has become all too well known in society at present, a locked briefcase can no longer be considered a harmless object. The police were justified for their own protection to in conduct an inventory search for weapons or explosives contained within the case. The fact that the case had been reduced to police possession is no longer sufficient protection against the possibility of danger.

Finally, the court is bound by the Ninth Circuit's holding in *United States v. Johnson*, 820 F.2d 1065, 1072 (9th Cir. 1987) that once evidence has been discovered during an initial, valid search, the suspect's expectation of privacy is thereby reduced as to the item searched. "[O]nce an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted

possession of the police, may be conducted without a warrant." *Johnson, Id.*, (quoting, *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir.), *cert. denied*, 461 U.S. 936 (1983). As this court has already held the intial search of the briefcase to have been lawful as incident to a valid arrest, the defendant no longer possessed a sufficient expectation of privacy with respect to the briefcase so as to complain of the inventory search.[7]

C. The Search of the Defendant's Parents' Home and the Search of Ms. Pelekai's Home.

The final search which the defendant contends is improper is the search of the homes of the defendant's parents and the passenger in his car, Ms. Pelekai. These searches were conducted pursuant to warrants obtained from Magistrate Tokairin, supported by an affidavit submitted by Agent Roger Kent. Agent Kent's affidavit incorporates the results of the two prior searches conducted.

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[7] This rationale extends with equal force to the defendant's contention that the search violated Hawaii state law as enunciated in *State v. Ching*, 67 Haw. 107, 111 (1984) and incorporated into federal law, according to the defendant, by *United States v. Wanless*, 882 F.2d 1459, 1464 (9th Cir. 1989). This court does not take issue with the holding of *Wanless* that inventory searches must be conducted in accordance with official procedures of the relevant state or local police department. But it is unnecessary for the court to reach the issue of whether the search in the instant case violated the strictures adopted by the Hawaii Supreme Court in *Ching*; since the defendant possessed a diminished expectation of privacy relative to the briefcase after the initial valid search, subsequent searches of the briefcase by police may be conducted without a warrant under *Johnson*, 820 F.2d at 1072.

The defendant contends that prior to these improper searches the FBI's investigation had not focused on the defendant, and that absent the information used by Officer Kent in his affidavit, the warrants would not have been granted.

The defendant's argument is that any information obtained from these searches is "fruit of the poisonous tree" and as such excludable under *Silverthorne Lumber v. United States*, 251 U.S. 385 (1920) and *Harrison v. United States*, 392 U.S. 219 (1968).

The particular paragraph where Agent Kent makes reference to the evidence obtained in the other searches is as follows:

> ¶ 13. At 1:00 a.m., 1/31/90, your affiant was called by HPD officer Jesse Babauta, receiving desk, HPD, and advised that Clint Nagano had just been arrested on traffic charges, and discovered in his possession was a briefcase containing $17,000 cash and handwritten notes indicating that Nagano had been recording information about various ATMs and their cash replenishment schedules.

It is clear that this paragraph does provide a significant amount of probable cause support for a search warrant. However, what the defendant fails to acknowledge is that the affidavit also contains additional information which would sustain a warrant, namely the designation of the defendant as the perpetrator of ATM burglaries by two independent informants.

The government also points out that when agents visited the homes of the defendant's parents and Ms. Pelekai, both consented to the entrance of the officers into

their homes and were very cooperative. Both parties allowed the agents to make a visual sweep of the defendant's living area in the homes. Ultimately, a search warrant was issued for each home. Given the occupants' consent, the government states that no evidence obtained from these searches can be suppressed, citing *U.S. v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (persons with joint access and control may consent to a search); *U.S. v. Yarbrough*, 852 F.2d 1522, 1534 (9th Cir. 1988) (same).

The defendant contends that when agents arrived at his parent's home, they waited until his father left the house and then "accosted him, told him they were seeking a warrant, told him they would receive it at any minute, and demanded that they be permitted to sit inside the house until the warrant arrived, in order to make sure no one disturbed or destroyed evidence[.]" Furthermore, the agents "threatened Defendant's father and mother with charges of aiding and abetting a bank robber, and obstruction of justice, if they did not cooperate." Brief of Defendant at pp. 6-7. Consequently, the defendant contends that any consent given by the occupants of the respective residences was coerced by threats from the FBI agents. Naturally, the government paints the picture in a much more benign way.

In the view of this court, a stronger argument is raised by the government in its contention that the warrant was based on ample independent sources of information. As has already been pointed out, Agent Kent not only made reference to the evidence seized in the searches by HPD, but also elaborated the identification of the defendant by two separate informants as the one who

was robbing the ATM's. Based on this additional information, the government contends that there was still probable cause for the warrant even if the court finds fault with the conduct of the HPD officers (which it has not). In *United States v. Miller*, 822 F.2d 828, 830-831 (9th Cir. 1987), the Ninth Circuit upheld a warrant based in part on illegally seized evidence by "subtracting" the offending statement from the affidavit and then examining the remainder. Having read Officer Kent's affidavit, this court is of the opinion that, if appropriate, the same thing could be done here. *See also, United States v. Grandstaff*, 813 F.2d 1353, 1355-57 (9th Cir. 1987) (warrant to search luggage upheld despite illegal entry into hotel room, when affidavit contained sufficient untainted information).

IV. Conclusion

Based on the facts as found by this court, and the legal conclusions elaborated above, this court holds that the search of the defendant's property at the scene was justified as incident to a valid arrest, that the subsequent inventory search was justified under standards elaborated by the U.S. Supreme Court and that sufficient probable cause existed to support the warrants which were executed upon the homes of the defendant's parents and his girlfriend, Ms. Pelekai. Accordingly, the defendant's motion for the suppression of evidence obtained from these searches is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 24, 1990 .

/s/ Martin Pence
UNITED STATES DISTRICT JUDGE

UNITED STATES V. CLINT NAGANO, CR. NO. 90-00287 HMF; ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CLINT NAGANO, Defendant-Appellant.	No. 91-10055 D.C. No. CR-90-00287-HMF ORDER (Filed Oct. 22, 1992)

BEFORE: GOODWIN, FLETCHER and BRUNETTI, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Fletcher and Brunetti vote to reject the suggestion for a rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.